Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

WILLIAM R. WHITE, JOHN G. GREENWOOD, RICHARD H. SCHLOBAUM, ROBERT D. SAMPSON, DAVID E. DAUM, BORJE H. VAGENIUS, Individually and on behalf of all others similarly situated,

Petitioners,

versus

SUNDSTRAND CORPORATION, SUNDSTRAND CORPORATION RETIREMENT PLAN - INDUSTRIAL, BARBARA J. KRAMER, DOUGLAS EBLEN, PLAN BENEFIT COMMITTEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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99 pp

QUESTIONS PRESENTED

Where the court has not found an ambiguity in the contract language, can the Plan fiduciaries substitute their interpretation of the plain meaning of the Plan--when the plain meaning of a Plan is changed by the new owners of the company, must that change be incorporated through an amendment to the Plan?

Should not a reviewing Court examine the plain meaning of the Plan language first before determining whether the Plan fiduciary's interpretation was arbitrary and capricious?

When the reviewing Plan fiduciaries request and receive legal advice from the attorneys for the Plan, should that advice be included as part of the administrative record?

Should the breach of fiduciary duty claims have been reviewed by the court under a *de novo* standard of review.

Should the district court have assessed costs against the named plaintiffs who serve as class representatives under Fed. R. Civ. P. Rule 23 for only their pro rata share? What is the effect of respondent's waiver of seeking costs from absent class members – can those costs be solely imposed on the class representatives?

Should the class representatives be permitted to locate on behalf of the Plan a representative class member who received phantom stock payments?

PARTIES TO THE PROCEEDING

William R. White, John G. Greenwood, Richard H. Schlobohm, Robert D. Sampson, David E. Daum, Borje H. Vagenius, bring this petition individually and on behalf of all others similarly situated, except for (4) below, in which case, William R. White, , John G. Greenwood, Richard H. Schlobohm, Robert D. Sampson, David E. Daum, Borje H. Vagenius bring this petition on behalf of themselves, only.

Petitioners are former directors and/or officers of Sullair Corporation ("Sullair") or a subsidiary. They are William R White (age 65), John G. Greenwood (age 86), Richard H. Schlobohm (age 74), Robert D. Sampson (age 77), David E. Daum (age 61), Borje H. Vagenius (age 73). They are acting on behalf of themselves and on behalf of the classes that have been certified and that they have been appointed to represent. Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

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The district court's October 19, 2000 opinion (per Reinhard, D.J.) taxing costs is found at Pet. App. 14a and the district court's September 30, 1999 opinion (per Reinhard, D.J.) granting petitioners' motion for class certification is found at Pet. App. 56a.

The district court's May 23, 2000 opinion (per Reinhard, D.J.) granting respondent's summary judgment motion (Appendix ("Pet. App.") 25a) is published at *White v. Sundstrand*, 2000 U.S. Dist. LEXIS 7273 (May 23, 2000).

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *White v. Sundstrand*, 356 F.3d 580 (7th Cir. 2000). (Pet. App. 1a)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 3, 2001.

Jurisdiction is based upon a federal question. William White and the other named plaintiffs sued on behalf of themselves and all those similarly situated alleging violations of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.*

STATEMENT OF THE CASE

Sullair was the sole sponsor of the Sullair Corporation Retirement Plan which was established in 1980. William R. White, the Chief Financial Officer of Sullair, worked with G. William Porter, an attorney with the law firm of McDermott, Will & Emery, to establish the Plan; several of the provisions that were inserted into the original draft were White's ideas which he communicated to the attorneys.

Sullair was acquired by Sundstrand as its wholly owned subsidiary in November 1984. Sundstrand also took over the administration and control of the Plan from the sale forward, through Sundstrand's employees, including Sundstrand's in-house counsel, Robert Quick, Sundstrand's in-house pension department, and employees Eblen, Kramer and Rose, and a number of other Sundstrand executives. The Sullair Plan was later amended and restated effective January 1, 1994 by Sundstrand as the Sundstrand Retirement Plan-Industrial to house a number of plans sponsored by its related companies in addition to the Sullair Plan. With this restatement, Sundstrand succeeded Sullair as the principal sponsor of the Plan and is the "named fiduciary" of the Plan.

The Plan Fiduciaries Sought And Received Legal Advice Regarding The Meaning Of The Sullair Plan Provisions That Affirmed Petitioner's Claims.

Following Sundstrand's taking control of Sullair, Porter learned that the Plan's actuaries were proposing a change in the way that the ESOP Offset benefit was to be calculated (by that time Bill White had ceased having responsibility for the Plan and had left Sullair in 1984). Porter disagreed with the actuaries' change in interpretation of the applicable plan provision. Porter's September 6, 1978 letter provides suggested language for the definition of Accrued Benefit under the Plan – "I would suggest that in defining the offset to be taken on account of the benefit accrued under the ESOP the language be somewhat more explicit."

> a. The amount of monthly pension which could be provided on a straight life annuity basis by application of an amount equal to the fair market value as of such specified date of the balance credited to his account under the Sullair Corporation Employee

> Stock Ownership Plan, and, for this purpose, such amount of monthly pension shall be determined on the basis of the annuity purchase rates in effect as of such specified date under and as set forth in the Group Contract.

The only rates in the Group Contract were immediate rates as Bonnie Blackburn of Sullair advised Eblen in a March 29, 1985 memorandum. On November 7, 1984, she relayed Porter's legal advice regarding the meaning of the ESOP Offset to the actuaries:

> Bill Porter felt that because of the way the benefit formula is written, we would be unable to use any interest accrued after an employee's termination to fund any part of their future benefit.

On February 28, 1985, Porter wrote to Bonnie Blackburn at Sullair regarding his disagreement with the change in how the ESOP Offset was to be calculated. Prior to Bill Porter's legal advice, the ESOP Offset had been calculated just as Porter advised to do it -- at the date of the plan participant's termination of employment (requiring the use of immediate rates that were part of the Group Contract). White also testified that use of the immediate rates is what was intended at the time the Sullair Plan was established. It is quite clear from Porter's February 28, 1985 letter that he disagreed with Bankers and that the ESOP Offset in effect at the plan participant's date of termination (using immediate annuity rates) should be used in calculating a plan participant's accrued benefit. It is clear from other documents that he disagreed with projecting interest through the earliest retirement date.

> Your first question involves the manner in which Bankers Life proposes to calculate the offset under the retirement plan for the value of ESOP benefits in the case of participants who terminate employment prior to retirement. I do not agree with the manner in which Bankers Life proposes to calculate the offset. What is contemplated by the retirement plan in the case of a terminated participant with a right to a deferred vested annuity is that such participant be vested in his accrued benefit under the plan determined at the date of his termination of employment, and moreover, the date of his termination of employment is the 'specified date' for purposes of determining the value of his ESOP benefit, as you indicate in your letter. The third amendment to the plan added a definition of 'ESOP benefit' for purposes of making this calculation. That definition provides that the ESOP benefit is the fair market value of the participant's vested interest as of any particular date . . . It was not intended and, in my view, does not require the attributing of future earnings or growth to the ESOP account for purposes of determining the offset to be applied to a deferred vested retirement plan benefit, particularly in view of the fact that the deferred vested retirement benefit is the participant's accrued benefit at the date of his termination of employment.

Deferred annuity factors have interest and mortality built in and necessarily add future earnings or growth to the ESOP until distributed. Both letters state the same thing—interest is not added. Porter's letter easily demonstrates that there was never any intent to add interest after a plan

participant terminated employment; therefore, immediate and not deferred rates were contemplated. The Group Annuity Contract had only immediate, and not deferred rates. Any change from the use of all immediate rates to using both immediate and deferred rates would have required a plan amendment. The reference to the Group Contract was never amended to include both immediate and deferred rates. In White's case, the change in interpretation resulted in $600 per month benefit. Porter had written to White about the plan language affecting the $600 per month difference in benefit Petitioner White would receive:

> Section 1.04 Accrued Benefit. This section essentially sets forth the pension formula to be employed under the plan, and I would suggest that in defining the offset to be taken on account of the benefit accrued under the ESOP the language be somewhat more explicit. In this connection, I would suggest something along the lines of the following:
>
> (c) The amount of monthly pension which could be provided on a straight life annuity basis by application of an amount equal to the fair market value as of such specified date of the balance credited to his account under the Sullair Corporation Employee Stock Ownership Plan, and, for this purpose, such amount of monthly pension shall be determined on the basis of the annuity purchase rates in effect as of such specified date under and

as set forth in the Group Contract.:

The January 1, 1989 version of the Plan sets forth actuarial equivalents for the plan. The interest rate in that document is 8-1/2 percent. Petitioners have claimed any underpayments caused by mistakes for whatever reason should be calculated using these rates, or the plan's actual rates, if higher. One is based on contract, the other in equity. White also brought related breach of fiduciary duty claims.

During the time that White filed claims under the claim review procedure and met with Robert Quick as part of that process, certain Sundstrand fiduciaries met with one of the Plan's attorneys, David Ellis, an attorney with the law firm of Kirkland & Ellis regarding the claims that White filed. Although Ellis could not recall what his advice was, his advice can be reconstructed from a chronology Quick authored that included this entry.

7/18/95	Ellis met with Traubenberg, Kramer And Quick in Rockford	All issues discussed, with Ellis expressing his opinion that we would not have a successful outcome if White and the others carry forward their claim

More information regarding the legal advice received from Ellis at this meeting can be reconstructed from the July 20, 1995 memorandum Kramer wrote to Eblen with a copy sent to other Plan fiduciaries (Quick, Ricketts, Rose and Traubenberg) requesting cost information and making reference to a meeting Plan fiduciaries had with David Ellis

just two days earlier. This memorandum referenced legal advice sought from and provided by David Elllis at a meeting on July 18, 1995 with Quick, Ellis, Eblen and Traubenberg. Quick confirmed that his consultation on that day with Ellis was strictly in connection with the ESOP Offset. From Quick's chronology, on the date of their July 18, 1995 meeting, the only claims Ellis could be referring to were post-1983 profit sharing claim and the ESOP Offset claim.

> From a meeting held this morning among Jim Ricketts, Neil Traubenberg, Bob Quick and myself, I was asked to request from you the following:
>
> The cost to the plan to calculate the ESOP offset for each applicable terminated employee, using the annuity purchase rate in effect on each person's date of termination. Bob Quick noted that this is in accord with the close reading of the plan provisions as discussed among you, him, Neil and David Ellis on the 18th.
>
> The cost items requested included the ESOP Offset Claim and the failure to include all Plan defined compensation in the calculation of retirement benefits for Sullair employees who retire on or after January 1, 1984.

The advice Porter and Ellis provided to the Plan fiduciaries was not protected by the attorney-client privilege based on the district court's ruling as well as existing law. Courts that have addressed the issue of disclosure have held that in litigation under ERISA alleging fiduciary breaches, the fiduciary cannot assert a blanket attorney-client privilege for the purpose of withholding information relating to the administration of the trust. *Washington-Baltimore*

Newspaper Guild Local 35 v. Washington Star Co., 543 F.Supp. 906, 909-10 (D.D.C. 1982). When fiduciaries seek advice about the administration of a trust or plan, they are seeking advice not for their own benefit but for the benefit of the beneficiaries of the trust. *Petz v. Ethan Allen, Inc.* 113 F.R.D. 495, 496-97 (D. Conn. 1985). Thus, they cannot later assert the attorney-client privilege to hield information from the beneficiaries.

White persisted with the claims. At no time was he aware of the legal advice received by the plan fiduciaries in 1984-1985 and in 1995. On January 14, 1997 White wrote to Ricketts and explained why Sundstrand's interpretation could not be correct.

> The only 'reason' given in your letter to me was that it has been 'the plan's consistent practice' to use deferred annuity factors. To do something consistently wrong doesn't make it right and certainly doesn't explain to me in understandable language why you think it is appropriate that two people with the same length of service, the same considered compensation, the same distribution from the ESOP on the same date, should get different pensions simply because one person has not yet attained the age at which the pension is payable. The Plan certainly does not contain any such provisions. . .

Internally at Sundstrand, Sundstrand fiduciaries with the closest knowledge regarding the claims, Quick and Eblen, were clearly hostile to White.

> The copy of White's letter dated 11-14-95 received by Don was forwarded to me by Dick. As you know, White is Sullair's former

> CFO who, despite recently winning the bulk of his pension appeal, continues to carp. Since he goes after me in his letter, I did not want to attempt an answer without the counsel of the outside lawyer I ask for second opinions. He was unequivocal in saying that White's letter should go unanswered. Any response by us will serve to validate White's position and precipitate DOL action.

On April 18, 1997, Eblen authored an internal Sundstrand memorandum addressed to "Dearest Billy-Boy" [White] with a copy to President Clinton and Phil the Pill (referring to Senior Investigator of the United States Department of Labor, Phil Goslawski) who audited Sundstrand as a result of White's complaints).

> Blah-blah-blah-blah-blah (same to you, buddy boy).
> * * *P.S. – Are you my friend? I feel like we have established quite a nice relationship during the past few years. I hope it has been *good for you as it has been for me (NO SHIT, SHERLOCK).*

Kramer at her deposition identified Eblen as the author.

District Court Proceedings

Respondents filed a motion for summary judgment. The district court granted that motion in its entirety. The district court determined that Petitioners claim that regular profit sharing payments under the company's cash profit sharing plan should not have been included in plan defined compensation solely on the basis that those amounts were not reported to the pension actuary by Sullair, failing to address the distinction between the two kinds of payments, only one

of which constituted bonus payments. The district court did not find any ambiguity in the Plan language, did not interpret Porter's March 1985 letter advising the Plan's actuaries that they were not interpreting the Plan, and relied on an affidavit of Porter that was attached to respondents' reply in support of their motion for summary judgment but this witness and the affidavit were never disclosed to Petitioners in violation of the discovery rules.

Seventh Circuit

The Seventh Circuit affirmed the district court. Although the Court makes reference to an analysis that includes the extent to which the decision-makers used the assistance of experts where necessary, the Court never reviewed the relevant Plan language relating to the ESOP Offset and interest rate claim; and never concluded that there was an ambiguity with respect to any of the contract claims.[1] Rather, the Court described the ESOP Offset as some kind of generic pension plan without recognizing that the end result may or may not hold in a given pension plan depending on

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[1] As a result, the ESOP offset described by the Court is not the same as the Plan's ESOP Offset. For example, payments under the ESOP Offset are based on average salary, beginning from date of employment (not high salary), benefits are based on average salary over the entire length of service (amount not based on employee's length of service and terminal salary), and employees were not entitled to buy Sullair stock (they participated in a plan that invested in Sullair stock that was frozen at the time of the sale and the stock converted to cash), and the statement "the plan takes the value of the employee's ESOP. . . and places that amount in a hypothetical savings account" is simply not the case at all.

the plan language.[2] The Court did not address the legal advice sought and obtained from Porter in 1984-1985 and by Ellis in 1995. The advice received is contrary to the interpretation of the Plan fiduciaries and the Court. That advice was never disclosed to Petitioners. Although the Court makes fleeting reference to the inclusion of profit sharing for those participants who left prior to January 1, 1984, the Court did not find an ambiguity in the contract language, yet affirmed the district court without further analysis. The district court had excluded the payment because Sullair had historically never given this compensation information to the actuary. The Court agreed with Petitioners that the failure to include phantom stock payments had been exhausted during the claim procedure and not waived; however, the Court found that because none of the named plaintiffs alleged that these payments had not been excluded, the representatives could not make this claim on behalf of the Plan.

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[2] The Court's analysis was self-constructed and not part of any material that the plan fiduciaries used in deciding the meaning of the plan language. The Court's example only works if an employee's average monthly salary for the last 20 years (after he attains age 45) of his career is less than his average monthly salary for the first part of his career (up to attainment of age 45). That is because salaries generally increase with age. Even under the Court's example, the ESOP benefit results in a so-called "kicker" of $500 per month, not zero as stated by the Court. Even using the unrealistic assumption that average monthly salary remains the same for the last 20 years before age 65, the "kicker" is then $2,500 ($6,000-$3,500 ESOP offset). Using the Court's example, and assuming that an employee continues to get modest annual raises of approximately 3.5%, the so-called "kicker" is $2,540. This shows that if the company simply pays its employees fairly, the pension takes care of itself.

This appeal followed.

Reasons for Granting the Writ

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISIONS BELOW CONFLICT WITH OTHER CIRCUITS' HOLDINGS WITH REGARD TO:

(1) WHETHER THE COURT MAY CONSIDER THE LEGAL ADVICE SOUGHT AND OBTAINED BY THE PLAN FIDUCIARIES ALTHOUGH THESE OPINIONS WERE NOT MADE AVAILABLE TO PETITIONERS DURING THE CLAIM REVIEW PROCEDURE.

In *Chambers v. Family Health Plan Corp.*, 100 F.3d 818 (10th Cir. 1996), the Tenth Circuit held that under the arbitrary and capricious review, the court must be limited to the record before the administrator. Other courts have confined their review only to the facts known to the administrator at the time the decision was made. *Lee v. Blue Cross/Blue Shield of Alabama*, 10 F.3d 1547, 1550 (11th Cir. 1994); *Smith v. Ameritech*, 129 F.3d 857 (6th Cir. 1997); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 827 & n.6 (5th Cir. 1996) Petitioners should not be prevented from raising the legal advice obtained by the Plan they represent and under *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 543 F.Supp. 906, 909-10 (D.D.C. 1982).

(2) A CONFLICT OF INTEREST AROSE AS A RESULT OF THE ACQUISITION OF SULLAIR BY SUNDSTRAND WHEN EBLEN, SUNDSTRAND'S IN-HOUSE ACTUARY, TOOK HARGE OF THE DECISION MAKING OF THE

SULLAIR PLAN AND REJECTED THE LEGAL ADVICE PROVIDED BY THE PLAN'S ATTORNEY REGARDING THE MEANING OF THE PLAN LANGUAGE RELATED TO THE ESOP OFFSET. BECAUSE OF THE CONFLICT, THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW BECAME SUBJECT TO A SLIDING SCALE .

After Petitioners filed suit, respondents brought counterclaims against Petitioner William R. White twice based on claims that the fiduciary decisions he made in connection with the claims of his lawsuit resulted in a negative charge on plan assets, a breach of fiduciary duty in connection with the Plan resulted in a higher charge on plan assets and a breach of fiduciary duty because of the decisions he made. White was asked in a deposition if he realized that because he was pursuing the claims on behalf of the Plan, this would cost Sullair more than anticipated based on the disclosures at the time of the sale. This action exemplifies why plan participants are concerned when the company they worked for is sold and unilateral changes are adopted.

The dissenting opinion in *Carr v. Gates Health Care Plan*, 195 F.3d 292 (7th Cir. 1999), *cert. denied*, 529 U.S. 1068, 146 L. Ed.2d 484, 120 S. Ct. 1675 (2000) reminded the Court that it must pay attention to pertinent plan language. By ignoring the plain language of the Plan, the administrative committee acted unreasonably. The multiple factor test in *Carr* differs from the five factor test in *Finley v. Special Agent's Mutual Benefit Association, Inc.*, 957 F.2d 617, 620 (8th Cir. 1992) and consequently there is a need for harmony and to protect the interests of plan participants by first examining the language of the contract.

In *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1409 (2d Cir. 1985), upon the sale of Western

Union to MCI, Western Union's pension plan was amended to make nonbargaining unit employees ineligible for certain Class 75 pensions.

> Turning first to the statute's legislative history, there can be no doubt that ERISA was enacted for the purpose of assuring employees that they would not be deprived of their reasonably-anticipated pension benefits; an employer was to be prevented from 'pulling the rug out from under' promised retirement benefits upon which his employees had relied during their long years of service. There was public concern 'that the enormous growth [in employee benefit plans] many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans.'

A number of circuits always apply the arbitrary and capricious standard to cases involving conflicts of interest, but decrease the amount of discretion given to the decision based on the seriousness of the conflict. *Doe v. Group Hospitalization & Med. Servs.*, 3 F.3d 80, 87 (4th Cir. 1993); *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 686-42 (5th Cir. 1992). The courts that apply this test maintain it adheres to the instruction in *Firestone Tire & Rubber Co. v. Bruch*, 289 U.S. 101, 109 S. Ct. 948, 103 L. Ed.2d 80 (1989) to treat conflicts only as a factor in determining abuse of discretion. In *Lee v. Blue Cross/Blue Shield of Alabama*, 10 F.3d 1547, 1552 (11th Cir. 1994), the court noted that the lack of a profit motive "is not necessarily dispositive of the self-interest dispute."

(3) THE BREACH OF FIDUCIARY DUTY CLAIMS SHOULD HAVE BEEN REVIEWED UNDER A *DE NOVO* STANDARD OF REVIEW.

Neither the district court nor the Seventh Circuit reviewed the breach of fiduciary duty claims under a *de novo* standard of review. Both the record before the district court and the breach of fiduciary duty claim that was presented to a plan fiduciary are reviewed de novo without regard to the plan language. Other circuits hold otherwise. Even if a plan fiduciary did review a statutory breach of fiduciary duty claim as part of the claim procedure, the fiduciary's statutory interpretations are reviewed de novo. *Quinn v. Burlington Northern Inc. Pension Plan*, 664 F.2d 675, 678 (8th Cir. 1981) (abuse of discretion standard does not apply to plan administrator's interpretation of statutory law). *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506 (5th Cir. 1994) (no deference to administrator's interpretation of law); *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1100 (5th Cir. 1990) (interpretation of ERISA itself must be made de novo); *Holt v. Winpisinger*, 811 F.2d 1532, 1536 (D.C. Cir. 1987) (administrator's determination regarding a question of law is not entitled to deference). Thus, the plan fiduciaries abused their discretion in deciding what benefits the plan could provide the participants and breached their obligations under ERISA.

(4) CLASS REPRESENTATIVES SHOULD ONLY BE RESPONSIBLE FOR THEIR PRO RATA SHARE OF COSTS UNDER FED. R. CIV. P. 23.

Exceptional circumstances warrant the exercise of the Court's discretionary powers, will be of aid of the Court's appellate jurisdiction, and that adequate relief cannot be obtained in any other form or from any other court for the claims desc4ribed in (4) and (5).

The bill of costs was entered against the named class representatives for their full, and not pro rata, share of those costs; in their motion, respondents waived their right to seek costs against absent class members.

The minimum number of class members is: Class A 53, Class B 162, and Class C 162, with some overlap. At the conclusion of the litigation with the entry of summary judgment in favor of respondents, respondents advised the district court that they were not seeking taxable costs from absent class members. The district court reduced Appellees' Bill of Costs from $45,291.97 to $17,893.55. The district court also ruled that absent class members were not responsible for taxable costs. However, the district court did not address the effect of respondents' waiver on the amount of taxable costs the class representatives would be responsible for other than to note that the class representatives asserted this claim on the basis that it would be unreasonable and unjust to burden the plaintiff class representatives with costs that are out of proportion to their interests in the case. Appellate courts review taxation of costs only for abuse of discretion. *In re Paoli Railroad Yard PCB Litigation*, 221 F.3d 440, 458 (3d Cir. 2000). In *Paoli*, the Third Circuit held that the district court abused its discretion in imposing joint and several liability for the costs award among nineteen plaintiffs. "We conclude that it was inequitable to saddle Cohen and Lamen with one hundred percent of the defendants costs . . when they were responsible for only a discrete and recognizable fraction of that sum. . ." *Id.* at 454. Fed. R. Civ. P. 54(d)(1) allows "costs other than attorneys' fees . . . as of course to the prevailing party unless the court otherwise directs. . . " The rule thus establishes that it is within the district court's discretion to award costs, and creates a presumption that a prevailing party will recover costs. *M..T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1409 (7th Cir. 1991). Therefore, the losing party must affirmatively show circumstances which overcome this presumption. *Id.*

Petitioners propose that a fair reading of Fed. R. Civ. P. Rule 23 would tax costs for each class member on a per capita basis where, as here, the district court had certified

classes under both 23(b)(2) and (b)(3). Should this court determine that the district court did not err in failing to give effect to respondents' waiver, the district court still erred in imposing all of the costs of the litigation upon class representatives totally out of proportion to their interest in the case. Because the district court determined that it had no basis to deny taxable costs for absent class members in class action lawsuits, it appears that the district court simply left the question open, giving no effect to either the effect of the waiver or the basic unfairness to class representatives. "All we have held is that a district court may not establish a per se rule that the representative plaintiff must be willing to bear all (as opposed to a pro rata share) of the costs of the action." *Rand v. Monsanto*, 926 F.2d 596 (7th Cir. 1991). To "require the representative of a class to bear the costs personally is "inconsistent with Fed. R. Civ. P. 23 because it would cripple the class action device that rule creates." *Id.* at 9. The Third Circuit's thorough review of equitable standards that could apply in awarding costs, also included the support for apportionment of costs among parties rather than joint and several liability, citing *David v. Parkman*, 71 F. 961, 964 (1st Cir. 1895) (holding that where the parties and the court "saw fit, for economical reasons . . . to consolidate the records," in determining costs, "the costs should," nevertheless, "be justly apportioned between the suits") and *Modick v. Carvel Stores of New York, Inc.*, 209 F.Supp. 361, 363 (S.D.N.Y. 1962) (holding that in a case in which several parties' actions were consolidated for trial—for the convenience of the parties and the court—"each case must stand on its own feet so far as costs are concerned"). Respondents had insurance which covered the cost of all of the expenses of the litigation and it is a routine matter to cover the risk of litigation and its costs through the purchase of insurance for claims made against the Plan. The district court did not provide a basis for respondents' request that costs be apportioned among the class members of the four separate classes. The district court made no apportionment finding. The possibility of taxing

such costs should put such a chill on plaintiffs and their attorneys' willingness to prosecute only ironclad claims such as large calculation error cases. Rule 23 should not be so limited. The Seventh Circuit simply noted that in this case, because notice had not been given to absent class members, costs could not be assessed.

(5) BECAUSE PETITIONERS HAVE BROUGHT THEIR SUIT ON BEHALF OF THE PLAN, THE PHANTOM STOCK CLAIM SHOULD BE REMANDED TO PERMIT THE COURT AND PETITIONERS TO LOCATE A PLAN PARTICIPANT WHO HAS THAT CLAIM.

The Seventh Circuit determined that the failure to include all FICA compensation in the calculation of pension benefits extended to the phantom stock claim. However, the Seventh Circuit determined that Petitioners lacked standing on behalf of the Plan to prosecute this claim. Petitioners should be allowed to survey the certified classes to locate a member of the class who has a representative claim.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

Nos. 00-2613, 00-4075 & 01-1126

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

William R. White, et al., on behalf of themselves
and a class of others similarly situated,
Plaintiffs-Appellants,

v.

Sundstrand Corporation, et al.,
Defendants-Appellees.

May 18, 2001, Argued

July 3, 2001, Decided

COUNSEL:

For WILLIAM R. WHITE, JOHN G. GREENWOOD, RICHARD H. SCHOLBAUM, ROBERT D. SAMPSPN, DAVID E. DAUM, Individauly and on behalf of all others similarly situated, Plaintiffs - Appellants (00-2613): Kristi L. Browne, WALNER & ASSOCIATES, Chicago, IL USA. Suzanne McCarthy, Chicago, IL USA.

For SUNDSTRAND CORPORATION, SUNDSTRAND CORPORATION RETIREMENT PLAN - INDUSTRIAL, BARBARA J. KRAMER, DOUGLAS EBLEN, PLAN BENEFIT COMMITTEE, Defendants - Appellees (00-2613): Peter M. Kelly, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, Chicago, IL USA.

For WILLIAM R. WHITE, JOHN G. GREENWOOD, RICHARD H. SCHLOBAUM, ROBERT D. SAMPSON, DAVID E. DAUM, Individaully and on behalf of all others similarly situated, Plaintiff - Appellant (00-4075): Suzanne McCarthy, Chicago, IL USA.

For SUNDSTRAND CORPORATION, SUNDSTRAND CORPORATION RETIRMENT PLAN, BARBARA J. KRAMER, DOUGLAS EBLEN, PLAN BENEFIT COMMITTEE, Defendants - Appellees (00-4075): Peter M. Kelly, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, Chicago, IL USA.

For WILLIAM R. WHITE, JOHN G. GREENWOOD, RICHARD H. SCHLOBAUM, ROBERT D. SAMPSON, DAVID E. DAUM, Individaully and on behalf of all others similarly situated, Plaintiffs - Appellants (01-1126): Dennis T. Trainor, WALNER & ASSOCIATES, Chicago, IL USA.

For SUNDSTRAND CORPORATION, SUNDSTRAND CORPORATION RETIREMENT PLAN, BARBARA J. KRAMER, DOUGLAS EBLEN, PLAN BENEFIT COMMITTEE, Defendants - Appellees (01-1126): Peter M. Kelly, OGLETREEM DEAKINS, NASH, SMOAK & STEWART, Chicago, IL USA.

JUDGES:
Before Easterbrook, Manion, and Evans, Circuit Judges.

OPINIONBY:
Easterbrook

OPINION:

Easterbrook, *Circuit Judge*. Until it became a subsidiary of Sundstrand in 1984, Sullair Corporation had a floor-offset pension plan. Distinctive features of that plan still apply to

persons who worked at Sullair before the acquisition. A floor-offset plan uses a defined-benefit structure (with pension payments linked to years of work and high salary) to buffer the uncertainty of a defined-contribution system (where pension payments depend on the performance of investments in each employee's account). *See Brengettsy v. LTV Steel (Republic) Hourly Pension Plan, 241 F.3d 609 (7th Cir. 2001);* Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans, 4 Fla. Tax Rev. 607, 668-71 (2000).* Sullair's pre-acquisition defined-contribution plan was an Employee Stock Ownership Plan. Employees were entitled to buy Sullair stock, which the esop would hold for their account. An esop is a high-risk investment: employees' retirement wealth is undiversified, so if something happens to the firm a retiree can end up with little beyond Social Security benefits, while if the firm prospers he may live in the lap of luxury. A defined-benefit component ensures that retirees have some supplement to Social Security even if the employer (or the stock market) goes south. The principal question in this class action is how the plans interact when an employee quits Sullair after pension benefits have vested, but before retirement age.

Sullair's floor-offset plan gives retirees the greater of the defined-benefit amount and the value of an annuity that could be purchased with the stock held for the retiree's benefit by the esop. If the annuity that could be purchased with the esop stock is less than the defined-benefit amount, then the defined-benefit plan pays the difference, topping up the employee's pension. Two aspects of this arrangement give rise to the question at hand. First, the employee does not surrender the esop units in order to receive a supplemental payment from the defined-benefit plan; the employee is free to cash out the esop and buy an annuity but also is free to keep the stock and continue to bear the risk. Second, and essential in light of the first, the coordination between plans

is done with a *hypothetical* annuity, which presents the question how the monthly annuity benefit will be calculated

An example shows how the floor-offset arrangement works. Suppose that a given employee who retires at age 65 would be entitled to a $ 2,000 monthly pension from the defined-benefit plan. This serves as the floor. If this employee has a $ 100,000 balance in the esop, the plan administrator determines how large an annuity the $ 100,000 could purchase. That would be about $ 900 per month (assuming 7% annual interest and a 15-year life expectancy). Sundstrand then would offset the $ 900 hypothetical annuity and pay the retiree $ 1,100 per month; the esop balance is the retiree's to annuitize, hold, or invest as he pleases. If, however, the employee has a $ 300,000 esop balance on retirement, an amount that could purchase an annuity of about $ 2,700 monthly, then the payment from the defined-benefit plan would be zero. Again the retiree retains the ability to draw down or invest the esop balance. Everything works smoothly when the employee starts receiving pension benefits immediately on leaving Sullair.

What happens when there is a gap between leaving Sullair and retiring? The plan's administrative committee calculates the monthly defined-benefit amount based on the employee's length of service and terminal salary. That much is uncontroversial. What about the defined-contribution offset? The plan takes the value of the employee's esop account on the day he left Sullair's employ and places that amount in a hypothetical savings account, at the same interest rate used in the annuity calculations, until the day the employee becomes eligible for retirement; at that point the balance is annuitized, and the resulting monthly benefit subtracted from the defined-benefit amount. So if an employee quits at age 45, with $ 100,000 in the esop account, and plans to retire at age 65, the plan assumes that this balance will compound for 20 years at the going rate (7% in our example), producing a kitty of almost $ 390,000 by

retirement. This sum, when annuitized, is about $ 3,500 per month, so the monthly defined-benefit is zero (but, as always, the employee can do what he pleases with the esop balance from age 45 onward). This process is equivalent to asking what monthly annuity an employee could buy with $ 100,000 today, when payments on the annuity would be deferred for 20 years. The parties call this approach the "deferred rate" calculation. The other approach, which the plaintiffs favor and call the "immediate rate" calculation, asks how large an annuity a 45-year-old could buy with $ 100,000 for immediate commencement. That would be about $ 640 monthly -- less than the $ 900 calculated in our first example because payments would be expected to last 35 years instead of 15. Under the immediate-rate calculation, then, the retiree's benefit from the pension plan would be $ 1,360 monthly, starting at age 65. Meanwhile the esop balance is likely to grow to $ 390,000 by age 65, so this person's total monthly benefit will be about $ 4,900 (the $ 1,360 from the plan, plus the $ 3,500 monthly that could be obtained by using the esop balance at age 65 to purchase an annuity). The difference between deferred and immediate calculation can be substantial (though there will be no difference if even the immediate-rate calculation exceeds the monthly pension generated by the defined-benefit component). The functional question is: Who gets the benefit of interest between quitting and retirement age, the employee or the plan?

Any pension plan giving retirees the greater of two amounts, as opposed to the sum of these amounts, can be described as confiscating the difference. That's the nature of a floor-offset plan: the retiree always "loses" the defined-contribution balance (principal and interest) up to the floor in the defined-benefit plan. What the employee loses, the plan receives. Using the esop to fund part of the defined-benefit promise makes any given level of promised benefits cheaper to the employer and so may increase the fallback pension. But under erisa that is neither here nor there. The Employee

Retirement Income Security Act does not require employers to establish plans that are particularly favorable to employees. There is no fiduciary duty to employees when establishing plans' provisions. *See Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 142 L. Ed. 2d 881, 119 S. Ct. 755 (1999); Lockheed Corp. v. Spink, 517 U.S. 882, 135 L. Ed. 2d 153, 116 S. Ct. 1783 (1996).* The employer's fiduciary duty, as plan administrator, is to implement faithfully the provisions of the plan as written. Thus we arrive at the critical language of the Sullair plan (we quote the 1981 version, which has not been altered substantively):

> The amount of monthly pension which could be provided on a straight life annuity basis by application of an amount equal to the fair market value as of such specified date of the Participant's vested interest in the balance credited to his account under the Sullair Corporation Employee Stock Ownership Plan, and, for this purpose, such amount of monthly pension shall be determined on the basis of the annuity purchase rates in effect as of such specified date under and as set forth in the Group Contract.

So the hypothetical calculation uses the "annuity purchase rates" -- whatever they are. In 1981 and for many subsequent years they were set by Bankers Life (now Principal Mutual Life Insurance Co.), which underwrote the plan with a group annuity contract. The first time the issue came up, Bankers Life used an immediate-rate approach, but it reversed itself before any benefits were paid and told the Plan Benefit Committee in May 1985 that a deferred-rate approach should be used. The Committee agreed, and a deferred-rate approach has been in force ever since.

Plaintiffs observe that immediate-rate calculations are used for persons still on Sullair's payroll at retirement, and they demand the same for themselves. Moreover, when the plan uses a deferred-rate calculation for persons who leave Sullair before retirement age, the floor-offset system loses some or all of its risk-buffering function. The deferred-rate calculation assumes that the balance in the esop will grow at some steady rate to retirement age. If it grows less (or even shrinks), the employee bears the whole loss, without any assistance from the defined-benefit component, although an employee who works at Sullair through retirement receives the assurance that if the esop's value collapses at the last moment, the defined-benefit floor still is there. (A person who leaves Sullair before retirement does have the option, however, of rolling the esop balance over into a more diversified fund, thus protecting against firm-specific risks.)

If immediate-rate calculations are used, however, then employees who leave Sullair before retirement age obtain a big advantage over those who stay -- for the floor-offset plan assuredly deprives lifetime employees of some or all value of growth in the esop account. Think again about our hypothetical employee, who accumulates a value of $ 100,000 in the esop by age 45. If the employee quits and retires 20 years later, an immediate-rate calculation provides that person with the full value of the esop plus $ 1,360 per month at age 65. Now suppose that the person decides to stay at Sullair through retirement and does not make further investments in the esop. If the value of the esop account grows at the assumed 7% rate, it will be worth $ 390,000 at age 65, and the monthly kicker from the defined-benefit component of the plan will be zero. Exactly the same investment strategy -- accumulate $ 100,000 by age 45, invest nothing for the next 20 years -- has substantially different effects, under plaintiffs' preferred approach, depending on whether the person leaves Sullair or stays to retirement. What sense does that make? Perhaps more to the

point, unless it is trying to encourage early retirement (which it isn't) why would Sullair want a pension plan that rewards employees for quitting? *Cf. McNab v. General Motors Corp., 162 F.3d 959 (7th Cir. 1998).* Employers can structure their plans to make it worthwhile for employees to leave, but firms usually want to encourage employees who have developed valuable skills and knowledge to remain -- and, not incidentally, encourage them to develop such firm-specific skills in the first place. Back-loading of compensation (through salary that generally increases with age as well as through defined-benefit pension plans) is a principal way to do this. See Edward P. Lazear & Robert Moore, *Pensions and Turnover, in Pensions in the U.S. Economy* 163-87 (Zvi Brodie, et al., eds. 1988); Edward P. Lazear & Sherwin Rosen, *Pension Inequality, in Issues in Pension Economics* 341 (Zvi Brodie, et al., eds. 1987). Plaintiffs' approach, by contrast, would produce a plan that treated workers staying through retirement age as suckers.

The need to use a different calculation strategy (immediate-rate for those who retire immediately, deferred-rate for those who retire later) in order to achieve an economically identical outcome offers very strong support for the plan's decision. Any remaining doubt is resolved by the fact that the plan contains a strong grant of discretion -- in both interpretation and application. Section 8.01 of the 1981 plan provides:

> The Plan Administrator will have complete control of the administration of the Plan, subject to the provisions hereof, with all powers necessary to enable it properly to carry out its duties in that respect. Not in limitation, but in amplification of the foregoing, it will have the power to construe the Plan and to determine all questions that may arise

> hereunder, including all questions relating to the eligibility of Employees to participate in the Plan and the amount of benefit to which any Participant, Beneficiary, spouse or Contingent Annuitant may become entitled hereunder. Its decisions upon all matters within the scope of its authority will be final.

This meets the requirements of *Herzberger v. Standard Insurance Co., 205 F.3d 327, 331 (7th Cir. 2000),* for discretion in the plan's interpretation. It was on the basis of the administrator's discretion that the district judge granted summary judgment on defendants' favor. *2000 U.S. Dist. LEXIS 7273* (N.D. Ill. May 23, 2000). We agree with the district court's conclusion that the Committee's decision was not arbitrary or capricious (the right standard when the administrator has interpretive discretion) -- and we would have reached the same construction as an independent matter if review were plenary.

Plaintiffs protest that deference is due to one of their number, rather than to the plan's administrator. According to plaintiffs, William R. White, the lead plaintiff, *drafted* the plan. Surely *he* is best suited to interpret it, plaintiffs insist. Not so. Self-interest would be disqualifying (White can't demand a right to calculate his own benefits), but we do not get that far. Section 8.01 gives interpretive discretion to the Plan Administrator, not to William R. White. The power goes with the office. A Secretary of Labor who drafts and promulgates a rule will have leeway to interpret its language only as long as she remains in office; when a new Secretary is confirmed, interpretive discretion comes with the job. The ex-Secretary may write op-ed pieces trying to influence the rule's application, but the elbow room that goes with delegated authority belongs to the incumbent, not to the author. Senator Wagner may have written the National Labor Relations Act, but the current members of the National Labor Relations Board (and sitting federal judges) hold the power

of interpretation. For the same reason, it matters not whether the interpretation changed in 1985, after Sundstrand acquired Sullair. Whoever sits on the Plan Committee today may change matters yet again; the discretion created by § 8.01 was not abolished in 1984 but passed to new holders.

Plaintiffs raised several arguments in addition to the immediate-rate claim, but several of these washed out before the suit began when the plan's administrative committee took a fresh look at its calculations, agreed with the plaintiffs' position, and raised their retirement benefits (and those of other Sullair employees) accordingly. Other claims survived and became the subject of this suit, though it is hard to see why. For example, plaintiffs contend that the value of phantom stock benefits (bonuses calculated by changes in the value of Sullair's stock) count as compensation for the purpose of calculating the defined-benefit component. Defendants responded that this may or may not be so, but that because none of the plaintiffs received phantom-stock compensation there was no reason to adjust their pensions. Plaintiffs ignore that problem on appeal. Plaintiffs did receive some profit-sharing payments and contend that these should be included in the base used to calculate the defined-benefit amount, but the plan documents explicitly exclude this possibility, as the district court correctly held. And the court was entirely right to deny plaintiffs' post-judgment motion, under Fed. R. Civ. P. 60(b)(3), accusing the defendants of fraud during discovery. Of this there is no evidence -- and as this opinion demonstrates the outcome of the case depends on the plan's terms and the administrator's discretion, not on who said (or wrote) what to whom many years ago.

After entering its judgment on the merits, the district court ordered plaintiffs to pay about $ 18,000 in costs under Fed. R. Civ. P. 54(d)(1). *2000 U.S. Dist. LEXIS 15335* (N.D. Ill. Oct. 19, 2000). The district court made the eight representatives jointly and severally liable for this amount. Plaintiffs do not contest the amount (a substantial reduction

from the bill of costs defendants submitted) but say that liability should be individual rather than joint -- and that the right denominator is the number of members in the class, rather than the number of representative plaintiffs. This class has a few more than 160 members, which implies a costs award of approximately $ 110 against each of the representatives. Any award against the absent class members would not be collectable -- not only because the defendants have said that they would not try to do so, but also because execution would not be lawful. Class members were not given notice and an opportunity to opt out of the case, and it is impossible to see how conscripts who did not even know of the case's existence, let alone have an opportunity to distance themselves from it, could be required to pony up. Neither the federal rules nor the due process clause of the fifth amendment would tolerate such a judicial order. So the upshot of plaintiffs' rule would be that the defendants must bear most of their own costs: the larger the class, the greater the proportion of costs that prevailing defendants must bear.

Yet Rule 54 says that the prevailing party recovers costs, and nothing in Rule 23 suggests that cost-shifting is inapplicable to class actions. What justification could there be for leaving prevailing defendants out of pocket? Our eight representative plaintiffs observe that they do not want to bear the high expenses of litigation, and that protestation is easy to believe -- but Sundstrand does not want to bear it either, and there is no justification for shifting the costs to the pension plan and forcing fellow retirees to bear the costs of the eight plaintiffs' mistaken litigation choices. Eight persons caused this litigation to be brought, caused the costs to be incurred, and should make the prevailing party whole. Now it's true, as the plaintiffs stress -- and as we recognized in *Rand v. Monsanto Co., 926 F.2d 596 (7th Cir. 1991)* -- that class actions are designed to aggregate claims of many persons with small stakes, and that a representative who has himself only (say) $ 1,000 to gain from success will be unwilling to

carry the load for the rest of the class. Even if the odds of winning are favorable, few people would start a case where their maximum gain is $ 1,000 yet they could be hit with a bill for $ 20,000 or $ 50,000 in costs if the defendants prevail. Demanding that representative plaintiffs personally cover all costs could be the demise of consumer class actions. The stakes in this case are considerably larger than $ 1,000 per person (indeed, each representative plaintiff had a stake exceeding the whole bill of costs), but the principle is general: The absent class members are free riders on the representative plaintiffs' legwork, and making the representatives' position financially risky would discourage class actions across the board.

It does not follow from this, however, that the prevailing defendant must bear the costs. Entrepreneurial attorneys already supply risk-bearing services in class actions. They invest legal time on contingent fee, taking the risk of failure in exchange for a premium award if the class prevails. A suit such as this, designed to generate a substantial financial return, induces lawyers to compete for the opportunity to represent the class. What we held in *Rand* is that, without violating ethical standards, attorneys may agree to bear the risk of a costs award, as well as the risk that their time will go uncompensated. By moving the risk of loss from the representative plaintiffs to the lawyers (who spread that risk across many cases and thus furnish a form of insurance) counsel can eliminate the financial disincentive that costs awards otherwise would create. In this case, however, the representative plaintiffs filed suit without securing from their lawyers any undertaking to pick up the tab; the lawyers have not volunteered to do so now that the plaintiffs have lost. The eight pensioners may view this as churlish -- and other would-be plaintiffs may take this into account when deciding whether to sign on with these lawyers -- but a decision by the representatives and their lawyers not to strike the bargain approved in *Rand* is a poor reason to drop the costs back in

defendants' laps. If this tactic succeeded, no sane class-action lawyer would again make the promise that the plaintiffs' lawyers made in *Rand*.

Plaintiffs have not cited, and we have not found, any case holding that responsibility for costs must be parceled out so that no member of a class pays more than a *pro rata* share. A few cases hold that costs awards should be several, rather than joint, when different groups of plaintiffs raise distinct issues that give rise to segregable costs of litigation. *See, e.g., In re Paoli Railroad Yard PCB Litigation, 221 F.3d 449, 468-71 (3d Cir. 2000); Davis v. Parkman, 71 F. 961, 964 (1st Cir. 1895)*. Plaintiffs do not contend, however, that a subset of their number was responsible for a discrete portion of defendants' costs in this case. There is no basis for an award on other than the normal joint and several terms of liability.

AFFIRMED

No. 98 C 50070

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

WILLIAM R. WHITE, JOHN G. GREENWOOD, RICHARD H. SCHLOBOHM, ROBERT D. SAMPSON, DAVID E. DAUM, MARTIN A. GRANO, WILLIAM M. VANDERSLICE, BORJE H. VAGENIUS, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

SUNDSTRAND CORPORATION, SUNDSTRAND CORPORATION RETIREMENT PLAN-INDUSTRIAL, BARBARA J. KRAMER, DOUGLAS EBLEN, PLAN BENEFIT COMMITTEE, JAMES F. RICKETTS, KENNETH EITENMILLER, HAZEN TUCK, PLAN APPEAL REVIEW COMMITTEE,
Defendants.

October 19, 2000, Decided

October 19, 2000, Filed

COUNSEL:

For PLAINTIFF: Bradley T. Koch, Holmstrom & Kennedy, Rockford, IL.

For PLAINTIFF: Michael R. Grimm, Clausen Miller P.C., Chicago, IL.

For PLAINTIFF: Lawrence Walner, Lawrence Walner & Assoc., Ltd., Chicago, IL.

For PLAINTIFF: Suzanne McCarthy, New York, NY.

For DEFENDANT: Peter M. Kelly, Olgetree, Deakins, Murphy, Smith & Polk, P.C., Chicago, IL.

JUDGES:
PHILIP G. REINHARD, JUDGE, UNITED STATES DISTRICT COURT.

OPINIONBY:
PHILIP G. REINHARD

OPINION:

MEMORANDUM OPINION AND ORDER

I. Introduction

Defendants prevailed on a motion for summary judgment on May 23, 2000, and subsequently submitted a Bill of Costs on June 21, 2000 in the amount of $ 45,291.97. The clerk entered the Bill of Costs in the amount submitted, and plaintiffs filed objections thereto. Defendants filed a reply to plaintiffs' objections, which plaintiffs moved to strike.

Currently before the court are defendants' request to enter a Bill of Costs under Fed. R. Civ. P. 54(d), Local Rule 54.1, and *28 U.S.C. § § 1920* and 1924, and plaintiffs' motion to strike defendants' reply memorandum in support of their Bill of Costs.

II. Preliminary Matters

Plaintiffs first seek to strike parts of a "Supplemental Declaration and Verification" filed by defendants which, along with several exhibits, allegedly reveals additional information regarding the identity and number of copies made of documents that defendants claim were necessary to the litigation. The court disagrees with plaintiffs' argument

that defendants should not have been allowed to present any supplementary affidavits past the thirty-day time limit set by Local Rule 54.1, as the Seventh Circuit has accepted the use of such affidavits for the purpose of clarifying Bills of Costs. See, e.g., *Commercial Credit Equip. Corp. v. Stamps, 920 F.2d 1361, 1367 (7th Cir. 1990).*

Plaintiffs also request that defendants' reply be stricken to the extent that it supports the defendants' request for taxable costs from absent class members. The court finds this request to be baseless, as defendants specifically acknowledge in their reply that "the parties agree that ... 'passive' (or 'absent') class members cannot be held responsible for taxable costs assessed in favor of a prevailing defendant ...." (Def. Reply, p. 5)

Plaintiffs also argue that portions of defendants' reply and exhibits which assert that plaintiffs' counsel charged defendants' counsel an $ 0.11 per page copy rate were misleading and should be stricken. The court disagrees. Defendants offered these additional materials as a valid response to plaintiffs' argument that defendants' copy rates (from $ 0.11 to $ 0.195 per page) were excessive. This evidence was offered to show that plaintiffs' counsel Walner was also charged an $ 0.11 per page copy rate, so that rate was not as unreasonable as plaintiffs had argued. (Def. Reply, p. 9) Defendants do not deny that plaintiffs' counsel McCarthy received a copy rate of $ 0.10, nor do they misrepresent plaintiffs' statements.

For these reasons, plaintiffs' motion to strike defendants' reply is denied.

III. Discussion

Fed. R. Civ. P. 54(d)(1) allows "costs other than attorneys' fees...as of course to the prevailing party unless the court otherwise directs...." The rule thus establishes that it is within the district court's discretion to award costs, and

creates a presumption that the prevailing party will recover costs. *M.T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404, 1409 (7th Cir. 1991).* Therefore, the losing party must affirmatively show circumstances which overcome this presumption. Id.

Plaintiffs first argue that no costs should be awarded to defendants on the grounds that: 1) defendants engaged in misconduct during the litigation of this case; or 2) after defendants have waived their right to claim taxable costs from absent class members, it would be unreasonable and unjust to burden the plaintiff class representatives with costs that are out of proportion to their interests in the case.

The Seventh Circuit has held that "generally, only misconduct by the prevailing party worthy of a penalty (for example, calling unnecessary witnesses, raising unnecessary issues, or otherwise unnecessarily prolonging the proceedings) ... will suffice to justify denying costs." *Congregation of the Passion, Holy Cross Province v. Touche, Ross & Co., 854 F.2d 219, 222 (7th Cir. 1988);* see also *Contreras v. City of Chicago, 119 F.3d 1286, 1295 (7th Cir. 1997).* Plaintiffs assert that defendants have engaged in such misconduct during the litigation of this case, and cite three examples of defendants' alleged bad faith. However, the court finds none of the instances of defendants' behavior cited by plaintiffs affirmatively shows misconduct that is "worthy of a penalty." Thus, the court will not deny costs to defendants on the ground of misconduct during litigation.

The court also refuses to deny all costs on the ground that it would be unfair to impose these costs on the individual class representatives. Plaintiffs cite *Rand v. Monsanto Co., 926 F.2d 596 (7th Cir. 1991),* for the proposition that it is unreasonable to impose costs upon class representatives totally out of proportion to their interest in the case, and that at most, a class representative can be held responsible for his or her pro rata share of costs based on the total number of

class members. The court disagrees with plaintiffs' reliance on Rand, which concerned a district court's assessment of the plaintiff as an adequate class representative. The Rand Court held that the trial judge, in disqualifying the plaintiff as a class representative, had improperly considered the plaintiff's unwillingness to bear responsibility for the payment of costs. *926 F.2d at 598-99.* The court did not discuss taxable costs, nor did it advocate a "pro rata share" approach in imposing taxable costs on class action representatives.

Moreover, plaintiffs' argument contravenes the well-established presumption that the prevailing party will recover costs. See *M.T. Bonk, 945 F.2d at 1409.* The Seventh Circuit has held that general exceptions for certain plaintiffs may not be "carved out" of Rule 54(d) unless expressly authorized by statute. See *Delta Airlines, Inc. v. Colbert, 692 F.2d 489, 490-91 (7th Cir. 1982)* (reversing denial of costs to prevailing party, despite trial court's reasoning that taxing costs to an individual Title VII plaintiff might discourage future Title VII suits). As the court is unaware of any statutory authority which allows an exception to Rule 54(d) for class action lawsuits, the court will not deny taxable costs to defendants on this basis. See Fed. R. Civ. P. 54(d)(1) (providing that the rule applies "except when express provision therefor is made either in a statute of the United States or in these rules").

Alternatively, plaintiffs dispute the necessity and amount of certain items in defendants' Bill of Costs. Plaintiffs object to all of the defendants' photocopying costs, certain witness fees, and certain deposition costs. The following is an analysis of each category of costs to which plaintiffs object.

Defendants request $ 36,240.64 for "fees for exemplification and copies of papers necessarily obtained for use in the case." *28 U.S.C. § 1920*(4). In support of their request for photocopying costs, defendants have attached invoices to their Bill of Costs, but the invoices contain no description of the documents copied. Plaintiffs argue

defendants failed to sufficiently demonstrate the necessity and reasonableness of their copying costs. In response to this argument, defendants attach to their reply brief a chart which has a description and number of copies made, but does not show the fee charged for each copying job.[1] The chart would have been sufficient documentation had defendants requested a flat copying rate, but defendants claim the fee varied because plaintiffs required them to sometimes add a laborious, time-consuming and expensive step to certain copying jobs because of a protective order. (Def. Reply, p. 9) The court is unable to independently determine the rate charged for each copying job because the invoices submitted with the Bill of Costs do not correlate with the chart submitted with defendants' reply brief.

Nevertheless, because defendants' chart provides a description of the photocopies, the court will use the chart, and will apply a uniform $ 0.10 per page photocopying rate. This is a reasonable rate well within market prices. See *Finchum v. Ford Motor Co., 57 F.3d 526, 534 (7th Cir. 1995).*

The court's selection of a uniform rate renders plaintiffs' objections to charges for the "Bates labeling" of certain documents a non-issue. Further, plaintiffs' objections to copies made at the Northern District of Illinois Clerk's office are likewise rendered a non-issue, since the court bases its findings on the numbers of copied pages listed in defendants' supplementary affidavit. The defendants concede those costs, (Defs' Reply, p. 10), and do not include them in the chart.

However, defendants' chart shows some of the costs they are seeking are improper. The phrase, "for use in the case" under *28 U.S.C. § 1920*(4) refers to materials actually prepared for use in presenting evidence to the court. *McIlveen v. Stone Container Corp., 910 F.2d 1581, 1584 (7th Cir. 1990).* In other words, photocopying charges attributable to discovery and the court's copies of pleadings, motions, and

memoranda are reasonably necessary for use in the case and can be awarded. *Arachnid, Inc. v. Valley Recreation Prods., Inc., 143 F.R.D. 192, 193 (N.D. Ill. 1992)* (Reinhard, J.). Thus, the court disallows all letters from defense counsel (which are letters dated: 4/15/98, 4/28/98, 4/30/98, 5/22/98, 6/2/98, 6/3/98 (2), 6/17/98 (2), 7/22/98, 9/1/98, 9/23/98, 10/2/98, 10/12/98, 10/29/98 (2), 11/4/98, 11/17/98, 11/19/98 (2), 11/20/98 (2), 11/24/98, 11/25/98, 11/30/98 (3), 12/15/98, 12/17/98 (2), 12/31/98, 1/5/99 (2), 1/8/99 (2), 1/12/99 (2), 1/18/99 (2), 1/20/99 (2), 1/21/99 (2), 1/28/99, 2/3/99, 2/9/99, 2/12/99 (3), 2/15/99, 2/16/99, 2/23/99 (2), 2/25/99, 2/26/99, 3/3/99, 3/4/99, 3/8/99 (2), 3/10/99, 4/8/99, 4/9/99, 4/13/99 (2), 4/15/99, 4/19/99, 4/22/99, 5/12/99, 5/20/99, 6/10/99, 6/28/99, 6/30/99, 7/14/99, 7/15/99, 7/20/99, 7/26/99, 7/27/99, 7/28/99 (3), 7/29/99, 8/3/99 (2), 8/11/99, 8/16/99, 8/19/99 (2), 8/30/99, 9/30/99 (2), 10/1/99, 10/5/99, 10/8/99 (2), 10/18/99, 10/19/99, 11/1/99, 11/5/99, 11/9/99, 11/10/99, 11/15/99 (2), 11/18/99, 11/19/99 (4), 12/7/99 (2), 12/20/99, 12/27/99, 1/5/00 (3), 1/11/00, 1/12/00, 5/1/00, 6/6/00, 6/9/00 (2), 6/20/00, 6/26/00).

Section 1920(4) also does not authorize defendants' copying of court filings for its own use. *McIlveen, 910 F.2d at 1584.* Thus, photocopy costs for documents copied for defendants' client, including documents from plaintiffs, (Def. Reply, Exh. 1, p. 22), a total of 69,207 copies, are not recoverable.

Plaintiffs also objected to costs for photocopies obtained from the U.S. Department of Labor ("DOL"). Plaintiffs challenge defendants' asserted costs for the DOL files, arguing they paid defendants $ 718.84, or half of the costs defendants now claim. Defendants' costs are based on four sets of copies (a total of 19,128 pages), which is allowable. However, the court will not allow defendants to recover for the copies made of plaintiffs' set of documents (1,922 pages), as they were made for defendants' own use and convenience. See *Arachnid, 143 F.R.D. at 193.*

In sum, defendants are allowed 98,922 copies, at $ 0.10 per page, for a total of $ 9,892.20 in copying costs.

. Defendants request $ 8,931.33 for "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." *28 U.S.C. § 1920*(2). Plaintiffs objected to, and defendants conceded, (Def. Reply, p. 10), the following amounts (which the court has independently verified): $ 257.50 for miniscripts ($ 50.00 subtracted from plaintiffs' objections because the court found no evidence that miniscripts were obtained for the Quick or the second Kramer depositions); $ 57.50 for ASCII diskettes ($ 25.00 subtracted from plaintiff objections because the court found no evidence that a diskette was obtained for the second Kramer deposition); $ 584.85 for expedited service charges ($ 5.90 subtracted from plaintiffs' objections due to clerical errors); $ 49.00 for postage costs ($ 10.80 subtracted from plaintiffs' objections because defendants did not include this charge in their Bill of Costs); and $ 61.13 for an "Accounting Service Fee." The court accordingly reduces the defendants' request for transcript fees to $ 7,921.35.

Plaintiffs further object to the cost of the Levy transcript, arguing that it was unnecessary since defendants failed to include the transcript in their summary judgment motion. However, it is well-established that the test for the necessity of a deposition is not whether it is actually used, but whether "the deposition was necessary when taken." *Apostal v. City of Crystal Lake, 165 F.R.D. 508, 511 (N.D. Ill. 1996)* (Reinhard, J.), overruled on other grounds by *Cengr v. Fusibond Piping Sys., Inc., 135 F.3d 445, 456 (7th Cir. 1998);* see also *Soler v. Waite, 989 F.2d 251, 255 (7th Cir. 1993).* Since plaintiffs have not shown the Levy transcript was unnecessary when it was taken, defendants are entitled to the cost of the transcript.

Plaintiffs also object to the costs of making additional and unnecessary copies of deposition exhibits. Defendants

generally deny that they made unnecessary copies of deposition exhibits, except whatever copies were needed to include with pleadings. (Def. Reply, p. 10) Plaintiffs fail to overcome the presumption that defendants are entitled to these costs.

Plaintiffs also object to the costs of obtaining transcripts of pretrial proceedings, arguing that defendants failed to demonstrate their necessity or the basis for their rate. Defendants did not explain the necessity of these transcripts in their reply. It has been held that pretrial transcripts can be taxed depending on the "length and complexity of both the pre-trial proceedings and the entire case, and on whether the pre-trial proceedings limited or clarified the issues in the case." *EEOC v. Sears, Roebuck & Co., 114 F.R.D. 615, 623 (N.D. Ill. 1987).* Given that this case involved complex litigation and heavily contested issues, and that defendants did not order transcripts for an excessive number of pretrial proceedings, the court will allow $ 183.00 for pretrial proceedings transcripts.

The court thus grants defendants a total of $ 7,921.35 in transcript costs.

. Defendants seek $ 120.00 for "fees and disbursements for ... witnesses." *28 U.S.C. §. 1920*(3). Plaintiffs object to witness fees for Ellis and Quick because defendants did not submit documents which showed that they had paid Ellis and Quick for their services. The court found documentation that showed defendants were charged by Ellis for his services. But in the case of Quick, defendants not only neglect to provide documentation, they also claim that "applicable authorities excuse the submission of a witness fee receipt with respect to Robert Quick." (Def. Reply, p. 10) However, the court is not aware of any authority which "excuses" the failure to provide documentation which shows that necessary fees were in fact charged. Thus, defendants' request for $

40.00 in witness fees for Robert Quick is denied, but the fees for Ellis are allowed.

The court grants defendants a total of $ 80.00 in witness fees.

Conclusion

For the reasons set forth above, plaintiffs' motion to strike defendants' reply is denied. Defendants' Bill of Costs is allowed in part; costs totaling $ 17,893.55 are awarded to defendants.

ENTER:

PHILIP G. REINHARD, JUDGE

UNITED STATES DISTRICT COURT

DATED: October 19, 2000

Footnotes

[1] Defendants' chart flatly contradicts their assertion that no record keeping system exists to provide the kind of documentation plaintiffs request. (Def. Reply, p. 8)

No. 98 C 50070

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
WESTERN DIVISION

WILLIAM R. WHITE, JOHN G. GREENWOOD, RICHARD H. SCHLOBOHM, ROBERT D. SAMPSON, DAVID E. DAUM, MARTIN A. GRANO, WILLIAM M. VANDERSLICE, BORJE H. VAGENIUS, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

SUNDSTRAND CORPORATION, SUNDSTRAND CORPORATION RETIREMENT PLAN-INDUSTRIAL, BARBARA J. KRAMER, DOUGLAS EBLEN, PLAN BENEFIT COMMITTEE, JAMES F. RICKETTS, KENNETH EITENMILLER, HAZEN TUCK, PLAN APPEAL REVIEW COMMITTEE,
Defendants.

May 23, 2000, Decided

May 23, 2000, Filed

COUNSEL:
For PLAINTIFF: Bradley T. Koch, Holmstrom & Kennedy, Rockford, IL.

For PLAINTIFF: Michael R. Grimm, Clausen Miller P.C., Chicago, IL.

For PLAINTIFF: Lawrence Walner, Lawrence Walner & Associates, Ltd., Chicago, IL.

For PLAINTIFF: Suzanne McCarthy, New York, NY.

For DEFENDANT: Peter M. Kelly, Ogletree, Deakins, Murphy, Smith & Polk, P.C., Chicago, IL.

JUDGES:
PHILIP G. REINHARD, JUDGE, UNITED STATES DISTRICT COURT.

OPINIONBY:
PHILIP G. REINHARD

OPINION:

MEMORANDUM OPINION AND ORDER

I. Introduction

Plaintiffs have brought a four-count complaint pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, *29 U.S.C. § 1001* et seq., against Sundstrand Corporation, Sundstrand Corporation Retirement Plan - Industrial ("Pension Plan"), the Plan Benefit Committee and two of its members, and the Appeal Review Committee and three of its members. In Count I, plaintiffs allege defendants improperly calculated pension benefits, in violation of section 1132 of ERISA. In Count II, plaintiffs allege defendants breached their fiduciary duties in allegedly failing to properly calculate pension benefits and failing to comply with ERISA's reporting and disclosure requirements. In Count III, plaintiffs allege defendants improperly retaliated against defendant White in violation of section 1140 of ERISA. In Count IV, plaintiffs allege defendants failed to comply with ERISA's reporting and disclosure requirements.

In their complaint, plaintiffs requested class-wide relief. In its Order dated September 30, 1999, this court granted plaintiffs' request in part. The court delineated two classes:

those employees who are or were participants in the Sullair Corporation Retirement Plan and whose compensation, for purposes of calculating retirement benefits, did not include pre-1983 profit sharing payments (Class A); and, those employees who were participants in the Sullair Corporation Retirement Plan and whose retirement benefits were allegedly improperly calculated because a deferred annuity rate, rather than an immediate annuity rate, was used in calculating each participant's ESOP offset (Class B). As for all other claims, the court denied class status.

Currently before the court is defendants' motion for summary judgment, filed pursuant to Fed.R.Civ.P. 56. The court has jurisdiction pursuant to *28 U.S.C. § 1331, 29 U.S.C. § 1132*(e)(1), and venue is proper in this district and division. See *29 U.S.C. § 1132*(e)(2).

II. Preliminary Matters

A. Local Rule 56.1 and Plaintiffs' Motion to Strike

At the outset, the court notes neither party has fully complied with Local Rule 56.1 (formerly known as Local Rule 12M, 12N). The court will start with defendants' LR56.1(a) statement. Several of defendants' paragraphs cite to other paragraphs contained within their Rule 56.1(a) statement of facts or contain legal argument, neither of which is proper. Several of defendants' citations do not support the statements contained therein.[1] For these reasons, the court will not consider the following paragraphs (or portions of a paragraph, as indicated) of defendants' LR56.1(a) statement of facts: 5 (except first sentence), 10, 12 (first sentence only), 25, 29 (except first sentence), 30, 31, 36, 41, 42, 43, 44, 49, 53 (except first sentence), 56 (except second sentence), 58, 69 (reference to immediate and/or deferred only), 73, 74, 79 (last sentence only), 83 (second sentence only), 84, 86, 87, 95 (except third sentence), 96, 101, 102, 103, 105, 106, 106A (first sentence only), 110, 112, 113, 115 (second sentence

only), 118, 119, 120 (portion after semi-colon only), 125 (last sentence only), 128-31, 132, 135, 143 (only reference to date in first sentence), 144, 145, 146, 149, 150, 155 (last sentence only), 165, 166, 168, 171, 173 (last sentence only), 177 (last sentence only), 184, 189, 191, 195 (information in parenthetical and last sentence only), 205 (phrase, "as expressly permitted by the Sullair Plan" only), 222, 227, 229, 231 (second sentence only), 234-35, 236, 242, 249, 256, 258, 259, 260, 266 (last sentence only), 268 (second sentence only), 270, 272 (last sentence only), 279, 292, 293, 294, 296 (last sentence only), 298, 299, 300, 306, 307 (last sentence only), 308, 309, 312 (except fourth sentence), 313 (last sentence only), 314, 315, 316, 317, 318, 319 (last sentence only), 320, 321, 322, 330 (last sentence only), 331 (first sentence only). Of the properly supported paragraphs, many of plaintiffs' denials are not properly supported. Plaintiffs' answers that do not deny properly supported facts in defendants' numbered paragraphs with citations to supporting evidence in the record constitute admissions. See *Michas v. Health Cost Controls of Ill., 209 F.3d 687, 689 (7th Cir. 2000).*

Plaintiffs' LR56.1(b) statement of facts suffers from some of the same problems. For example, several of plaintiffs' paragraphs do not cite to the record at all, or the citation does not support the statements contained therein, or the citation is to a deposition in general, and it is well-settled the court's job is not to scour the record looking for factual disputes. See *Waldridge v. American Hoechst Corp., 24 F.3d 918, 921-22 (7th Cir. 1994).* Of the paragraphs where the citation does not support the facts contained therein, the court was able to determine the proper exhibit in some instances.[2] In all other instances, the paragraphs are not deemed properly supported and are considered stricken. Thus, the court will not consider the following paragraphs (or portions of paragraphs, as indicated) of plaintiffs' LR56.1(b) statement of additional

facts: 2, 6 (first sentence only), 7, 10, 11, 13, 14, 19, 30 (regarding who wrote document only; no foundation), 34.

In addition, defendants viewed plaintiffs' statement of additional facts as an opportunity to file yet another statement of facts, which is improper under the local rules. Plaintiffs' statement of additional facts under LR56.1(b)(3)(B) does not give defendants free license to file yet another statement of facts. Rather, under LR56.1(a), defendants' reply is limited to concise, properly supported replies to each of plaintiffs' numbered paragraphs. Moreover, defendants replied to each of plaintiffs' responses to their original LR56.1(a) statement of facts, which is also improper.

As a result, plaintiffs have moved to strike defendants' responses/replies to plaintiffs' LR56.1(b) statement and defendants' reply brief in support of their motion for summary judgment. The court grants plaintiffs' motion in part. Defendants' replies to plaintiffs' responses are stricken, and the court will consider only those properly supported paragraphs in defendants' LR56.1(a)(3)(B) statement which are responsive to plaintiffs' properly supported LR56.1(b)(3)(B) statements. The court finds the Porter affidavit to be properly responsive to facts contained in plaintiffs' statement of additional facts and will consider it, but strikes the affidavits of Levy and Kelly. The court will follow the same reasoning with respect to the corresponding portions of defendants' reply brief.

The court also notes that plaintiffs have filed an appendix to their response brief (titled, "Appendix to plaintiffs' memorandum in opposition to defendant's [sic] motion for summary judgment"). This is improper. Any facts in plaintiffs' response brief should have appeared in their LR56.1(b) statement of facts and been properly supported therein. Plaintiffs' attempt to add new facts in their response brief frustrates the purpose of Local Rule 56.1. Thus, this appendix is stricken and, likewise, any facts appearing in the

response brief which are not in their LR56.1(b) statement, properly supported, are stricken.

B. Defendants' Amended Motion in Limine

Defendants have filed an amended motion in limine relating to the testimony of Albert Grasso, plaintiffs' expert witness, and William Porter, former legal counsel to Sullair Corporation. In response, plaintiffs have filed a motion to strike certain affidavits and corresponding portions of defendants' reply brief in support of their motion in limine.

Regarding Grasso, defendants challenge the admissibility of only portions of his testimony, but do not challenge his testimony under the guidelines set forth in *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999),* and *Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993),* interpreting Fed.R.Evid. 702. See also *Ancho v. Pentek Corp., 157 F.3d 512, 515 (7th Cir. 1998).* Rather, defendants primarily seek to exclude only those statements which they argue constitute improper legal conclusions. The court recognizes the ultimate issue of whether defendants' conduct was arbitrary and capricious is for the court to determine, and will reject any statements which are improper legal conclusions. The remainder of defendants' arguments go to the weight to be accorded Grasso's testimony, not its admissibility.[3]

As for Porter, defendants argue plaintiffs should be barred from introducing as evidence a letter dated February 28, 1985, from G. William Porter, an attorney, to his client, Sullair Corporation ("the Porter letter"), on the grounds of attorney/client privilege. Defendants concede plaintiffs received the Porter letter from Bankers' Life (now known as Principal Mutual) pursuant to a subpoena. Thus, either Porter or a Sullair employee gave the letter to Bankers' Life. In either event, the court finds the attorney/client privilege has

been waived. Defendants' remaining argument regarding the Porter letter, see Def. Mot. Limine, p. 19, P 27, is rejected, as the court finds questions of fact exist as to whether the committees in 1985 were in possession of the Porter letter. For these reasons, defendants' amended motion in limine is denied. Plaintiffs' motion to strike certain affidavits and portions of defendants' reply brief in support of their motion in limine is, therefore, denied as moot.

III. Background Facts[4]

The Sundstrand Corporation Retirement Plan -- Industrial ("Pension Plan") is an employee pension benefit plan within the meaning of ERISA. Although the parties dispute how to characterize the evolution of the Pension Plan, the bottom line is that Sullair Corporation (which Sundstrand acquired in 1984) established a pension plan, effective January 1, 1981, which was amended and restated several times and is now part of the Pension Plan. Various prior versions remain in effect. For purposes of this lawsuit, the court is particularly interested in provisions from the 1981 Sullair Plan ("the 1981 Plan") and the 1984 Sullair Plan ("the 1984 Plan") because all of the named plaintiffs were executives of Sullair Corporation and their employment terminated on or before December 31, 1985. (LR56.1(a) P 14-15) Sundstrand is the Plan Administrator of all relevant plans. (Id. P 45)

During all relevant times, Sullair and Sundstrand had a three-tiered committee structure for its claims procedure. Initially, a Plan participant presented a claim to the Plan Benefit Committee. (Id. P 40) If the Plan Benefit Committee denied the claim, the participant could appeal the decision to the Appeal Review Committee. (Def. Exh. B(12), Quick dep., p. 20) The Employee Benefit Committee appointed members of the Plan Benefit and Appeal Review Committees. (LR56.1(a) P 40) Defendants Kramer and Eblen are members of the Plan Benefit Committee. (Id. P 50) Defendants

Eitenmiller and Tuck are members of the Appeal Review Committee, and defendant Ricketts is a former member of this committee. (Id. P 54)

The Sullair Plan was initially funded through a group annuity contracts issued by Bankers' Life. (LR56.1(a) P 60) From approximately 1981 until 1986, Bankers' Life performed various services with respect to the Sullair Plan, including actuarial, benefit calculations, record keeping, and disclosure drafting. (Id. P 62) Bankers' Life was responsible for such services during the period plaintiffs allege their compensation was undercounted. (Id. P 63) Beginning in 1986, Sundstrand's Plan Administration staff performed benefit calculations, receiving some assistance from Bankers' Life on a consulting basis until May of 1992.[5]

The relevant provisions of the 1981 and 1984 Plans base benefit calculations on "average compensation." The 1981 Plan defines this term to mean, "on any specified date, the monthly average of a Participant's total pay received from the Employer for all Compensation Years ending prior to the earlier of the specified date or his Normal Retirement Date." 1981 Plan, § 1.02, at Bates No. 003058. The 1984 Plan definition does not differ in any material way. See 1984 Plan, § 1.02, at p.6. Both definitions use FICA taxable compensation as the general test for determining what specific items of pay must be counted as compensation for Plan purposes. (LR56.1(a) P 77)

IV. Discussion

Summary judgment is appropriate if the record reveals there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Krawczyk v. Harnischfeger Corp., 41 F.3d 276, 278 (7th Cir. 1994).* A fact is material only if it might affect the outcome of the case under the governing law. *Mers v. Marriott Int'l Group Accidental Death and Dismemberment Plan, 144 F.3d 1014, 1019* (7th Cir.), cert. denied, *525 U.S.*

947, 142 L. Ed. 2d 307, 119 S. Ct. 372 (1998). In deciding a motion for summary judgment, all evidence is viewed in the light most favorable to plaintiffs, and all reasonable inferences are drawn in their favor. *Krawczyk, 41 F.3d at 278.*

A. Count I

1. Standard of Review

In reviewing the interpretations of Plan documents by the Plan Benefit and Appeal Review Committees, a deferential standard of review is appropriate when plan language authorizes the plan administrator to exercise discretionary power to determine eligibility for benefits or to construe terms of the plan. *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989); Krawczyk, 41 F.3d at 278.* However, the conferral of discretion is not to be assumed, particularly given the importance of ERISA fringe benefits to employees. *Herzberger v. Standard Ins. Co., 205 F.3d 327, 331 (7th Cir. 2000).* An ERISA plan that contains language such as, "benefits under this plan will be paid only if the plan administrator decides in his discretion that the applicant is entitled to them," will be interpreted to confer discretionary power on the plan administrator. Id. While a plan is not required to have this exact language to be interpreted as conferring discretionary authority on the plan administrator, the language must express sufficient clarity that a discretionary determination is envisaged. Id. Where a plan confers power on the administrator to exercise discretion, the court's review is limited to whether the plan administrator's decision was "arbitrary and capricious." *Mers, 144 F.3d at 1019.*

Here, contrary to plaintiffs' perfunctory argument, see Pl. Resp., p. 9, the court finds the arbitrary and capricious

standard of review applies in light of clear and unequivocal plan language. Section 8.01 of the 1981 Plan states:

> The Plan Administrator will have complete control of the administration of the Plan, subject to the provisions hereof, with all powers necessary to enable it properly to carry out its duties in that respect. Not in limitation, but in amplification of the foregoing, it will have the power to construe the Plan and to determine all questions that may arise hereunder, including all questions relating to the eligibility of Employees to participate in the Plan and the amount of benefit to which any participant, Beneficiary, spouse or Contingent Annuitant may become entitled hereunder. Its decisions upon all matters within the scope of its authority will be final.
>
> ***
>
> The Plan Administrator will receive all applications for benefits and will determine all facts necessary to establish the right of the applicant to benefits under the provisions of the Plan and the amount thereof as herein provided.

The language in the 1984 Plan is substantially similar. See 1984 Plan, § 8.01. This language vests the Plan Benefit and Appeal Review Committees with discretionary power, and the court will review their decisions under the arbitrary and capricious standard of review. See *Herzberger, 205 F.3d at 331; Krawczyk, 41 F.3d at 278.*

Under this standard, a decision will be overturned only if it is "downright unreasonable." *Carr v. Gates Health Care Plan, 195 F.3d 292, 294 (7th Cir. 1999)*, cert. denied, *146 L. Ed. 2d 484, 120 S. Ct. 1675 (2000)*. It is not the court's job to

decide whether it would reach the same conclusion as the Plan or rely on the same authority. Id. If the administrator makes an informed judgment and articulates an explanation for it that is satisfactory in light of the relevant facts, the administrator's decision is final. Id. In applying this standard of review, the court evaluates several factors, including: the impartiality of the decision-making body, the complexity of the issues, the process afforded the parties, the extent to which the decision-makers used the assistance of experts where necessary, and the soundness of the fiduciary's ratiocination. *Carr, 195 F.3d at 295.* In addressing the soundness of the fiduciary's ratiocination, the court starts with the text of the plan and determines whether the administrator's approach shows a reasoned train of thought, one that makes a rational connection between the issue to be decided, the evidence in the case, the relevant text and the conclusion reached. *Cozzie v. Metropolitan Life Ins. Co., 140 F.3d 1104, 1109 (7th Cir. 1998).*

2. Directors Fees, Mortgage Assistance Payments, Moving Expenses, Phantom Stock, "Other" FICA Payments

Plaintiffs initially based part of Count I on a claim that directors fees, mortgage interest payments and relocation expenses should have been included in the calculation of participants' pension benefits. (Compl. P 37) Defendants have produced uncontradicted evidence showing they agree with plaintiffs that such payments should be included in eligible participants' pension benefits. More importantly, defendants have produced uncontroverted evidence that they recalculated the pension benefits of all eligible participants to include such payments. Specifically, defendants systematically reviewed Sullair's payroll records to determine which participants had received mortgage assistance payments, relocation expenses, and directors fees, and the amount of such payments. (LR56.1(a) P 126) Eventually, the pension benefits of approximately *300 employees* were adjusted to

include this additional compensation in the calculation of their benefits. (Id.; Def. Exh. (A)(1), Rose Aff., P 3-6; Def. Exh. (B)(15), Rose dep., p. 15).

In the face of defendants' overwhelming evidence, plaintiffs simply point to the fact that defendants did not recalculate the pension benefits of seven eligible participants. See Def. Exh. (B)(15), Rose dep., p. 8-9; Def. Exh. (C)(7), Bates No. 009839-42. The court finds plaintiffs' response unpersuasive for two reasons. First, defendants have produced evidence showing the recalculations for the remaining seven participants have been completed. See Def. Exh. (A)(1), Rose Aff., P 4. Second, the delay in calculating the benefits of these seven participants is understandable, given the lack of information available to Denise Rose, a Senior Benefit Administrator at Sundstrand who was responsible for performing the recalculations. Thus, these claims in Count I are moot.

In their complaint, plaintiffs also fleetingly reference phantom stock as another source of payment which should have been included in participants' compensation for purposes of determining their pension benefits. (Compl. P 63) However, they have never again mentioned any issues relating to phantom stock. Therefore, that portion of their claim is waived. Likewise, to the extent their complaint includes a vague reference to other, unspecified payments subject to FICA, see LR56.1(a) P 188, this claim is also waived.

3. Profit Sharing

Prior to its acquisition by Sundstrand, Sullair paid profit sharing payments in profitable years. Plaintiffs allege certain profit sharing payments should be included in the definition of compensation for purposes of calculating pension benefits. In 1980 and 1981, Sullair paid profit sharing in the form of cash. (Id. P 93) In defining "average compensation," the 1981 Plan states in part:

> Pay as used in this definition means the amount of compensation subject to tax for Social Security benefits without regard to the dollar limitation on such compensation subject to FICA taxes, *excluding any bonus payments under the Employer's cash profit sharing plan.*

(1981 Plan, § 1.02, at Bates No. 003058) (emphasis added) The 1984 Plan's definitions of "average compensation" and "compensation" do not include any reference to bonus payments under Sullair's cash profit sharing plan. See 1984 Plan, § 1.02.

In presenting his claim to the Plan Benefit Committee, White argued the 1981 Plan's reference to bonus payments under Sullair's cash profit sharing plan is inapplicable to profit sharing paid out quarterly according to an established formulae. (LR56.1(a) P 100) According to plaintiffs, the reference to profit sharing payments is to bonuses the Sullair President made to management completely at his discretion. In presenting this claim to the Plan Benefit Committee, White apparently told the committee the quarterly, established profit sharing payments had been included in the definition of compensation in the past. On November 17, 1994, the Plan Benefit Committee approved the recalculation of White's benefits to include such profit sharing payments. (Id. P 121)

Subsequent to this decision, other participants filed similar claims. (Id. P 122) In preparation for these claims, Kramer, a Senior Benefits Analyst at Sundstrand and a member of the Plan Benefit Committee, along with Robert Quick, Sundstrand's in-house legal counsel, traveled to Sullair's offices in Indiana and reviewed old Sullair Plan and payroll files. (Id. P 123) They learned that profit sharing payments had never been counted as compensation during the days when Bankers' Life was administering Sullair's Plan. (Id.) Based on this information, at a meeting held on February 16, 1995, the Plan Benefit Committee decided not

to include profit sharing payments in the definition of compensation, thus reversing in part its earlier decision regarding White's claim. (Id. P 124)

White and other claimants appealed this decision to the Appeal Review Committee. On September 18, 1995, the Appeal Review Committee reversed the Plan Benefit Committee's decision in part. The Appeal Review Committee determined that participants covered by the 1984 Plan were entitled to have profit sharing payments included in the calculation of their benefits because the exclusionary language referencing Sullair's cash profit sharing plan, found in the 1981 Plan, had been removed from the 1984 Plan. (LR56.1(a) P 125) However, because of the 1981 Plan's specific exclusion of profit sharing payments, the Appeal Review Committee determined that no profit sharing payments counted as compensation under the terms of the 1981 Plan. (Id.) Because White had still been employed at Sullair in 1984 so that the calculation of his benefits were governed by the 1984 Plan, the Appeal Review Committee directed that profit sharing payments he had received should be included in the calculation of his benefits. In accordance with this decision, defendants included profit sharing payments for eligible participants in its recalculation project (discussed in section IV(A)(2) above).

Thus, based on defendants' corrective action, the only participants who could maintain a claim in Count I are those who are covered by the 1981 Plan but not the 1984 Plan.[6] Of the named plaintiffs, Grano, Greenwood, Sampson, Schlobohm and Vagenius fall within this category. (LR56.1(a) P 97) Plaintiffs have not shown how the Appeal Review Committee's decision could be viewed as unreasonable. Plaintiffs state that their expert, Albert Grasso, opined that profit sharing payments prior to 1984 should have been included and that the failure to do so is arbitrary and capricious. (Pl. Resp., p. 16)[7] The court finds plaintiffs' reliance on Grasso's opinion does not carry the day. The only

evidence before the court is Grasso's statement that in his opinion profit sharing (among other items) should be included in the definition of compensation under the terms of the applicable plan documents, and "the failure to include all eligible compensation in determining pension benefits is arbitrary and capricious." Pl. Exh. 24, p. 3-4; see also Pl. Exh. 23, p. 1; LR56.1(b) P 33. That is the extent of Grasso's opinion. This opinion is completely barren of any reasoning, explanation or recitation of facts showing how Grasso arrived at this conclusion. Grasso's opinion is nothing more than a legal conclusion and does not show the Appeal Review Committee's decision is unreasonable.

Plaintiffs also argue the Appeal Review Committee acted unreasonably in rejecting White's explanation that the 1981 Plan's exclusion of bonus payments under Sullair's cash profit sharing plan meant bonus payments Sullair's President paid at his discretion, but did not mean profit sharing paid out quarterly according to an established formula. (Compl. P 31; LR56.1(a) P 100) However, plaintiffs have completely failed to produce any evidence showing the Appeal Review Committee acted unreasonably in rejecting this interpretation. On the contrary, the plain language of the 1981 Plan supports the committee's ratiocination. The 1981 Plan excludes "***any*** bonus payments" under Sullair's "cash profit sharing plan," which is broad, exclusionary language. Moreover, it is uncontroverted that Bankers' Life had never included profit sharing payments in its calculations of pension benefits. (LR56.1(a) P 123) The Appeal Review Committee's interpretation of this language was not unreasonable. See *Olander v. Bucyrus-Erie Co., 187 F.3d 599, 607 (7th Cir. 1999)* (plan administrator did not abuse its discretion in its interpretation of "compensation")

4. ESOP Offset

The Pension Plan is a floor offset plan in which a portion of the formula benefit ("accrued benefit") is paid from an

Employee Stock Ownership Plan ("ESOP"). (LR56.1(a) P 193) Thus, a participant's accrued benefit at retirement is coordinated with his or her ESOP balance. (Def. Exh. B(2), Eblen dep., p. 59) Under this approach, the ESOP balance is subtracted from the monthly retirement benefit a participant would receive from the Pension Plan. In performing this calculation, the ESOP balance must be converted from a fixed dollar amount to a monthly annuity amount, then subtracted from the monthly retirement amount (called the "ESOP Offset").

Section 4.02 of the Pension Plan addresses this, stating that a participant's accrued benefit is reduced as follows:

> The amount of monthly pension which could be provided on a straight life annuity basis by application of an amount equal to the fair market value as of such specified date of the Participant's vested interest in the balance credited to his account under the Sullair Corporation Employee Stock Ownership Plan, and, for this purpose, such amount of monthly pension shall be determined on the basis of the annuity purchase rates in effect as of such specified date under and as set forth in the Group Contract.

(Compl. P 46; 1981 Plan, § 4.02(c), Bates No. 003073; see also 1984 Plan, § 4.01(c) (nearly identical)).

Plaintiffs argue the ESOP offset amount has been improperly calculated because defendants are valuing the portion of the benefit provided by the Sullair ESOP by using a deferred annuity rate, in the case of deferred vested participants, instead of using an immediate annuity rate, as is used for participants who start getting their benefits immediately. (LR56.1(a) P 194; Pl. Resp., p. 3-4) It is clear

from section 4.02(c) that the Pension Plan documents (both the 1981 and 1984 versions) are silent on this issue; in other words, section 4.02(c) does not use either "immediate" or "deferred." See, e.g., Def. Exh. C(3), Eitenmiller dep. exh. 13, Bates No. 002518-20 (noting Plan documents do not specify use of immediate or deferred annuity factors). In these circumstances, plaintiffs face a formidable hurdle in trying to show the interpretations of the Plan Benefit Committee and Appeal Review Committee are downright unreasonable. See *Hightshue v. AIG Life Ins. Co., 135 F.3d 1144, 1149 (7th Cir. 1998)* (under deferential standard of review, plan administrator may conclusively interpret ambiguous plan terms); *Gallo v. Amoco Corp., 102 F.3d 918, 922 (7th Cir. 1996)* (same), cert. denied, *521 U.S. 1129, 138 L. Ed. 2d 1031, 117 S. Ct. 2532 (1997).*

Sullair initially addressed this specific issue in 1985. (LR56.1(a) P 195) When preparing the calculations for the first group of deferred vested participants, Bankers' Life used immediate annuity rates. (Id. P 196) However, in a letter dated February 6, 1985, Betty Perry, a Senior Administrator at Bankers' Life, describes this as being an "error." (Def. Exh. A(1), Rose Aff., Exh. E, Bates No. 004727; LR56.1(a) P 197) Perry states:

> Because benefits are deferred to age 65, the rates used to calculate the ESOP offset should reflect the period of time between termination and commencement of benefit payments. Simply stated, $ 1.00 invested for the next 20 years can provide a larger benefit than the same $ 1.00 could provide today.

(Def. Exh. A(1), Rose Aff., Exh. E, Bates No. 004727) In response, Bonnie Blackburn, Sullair's Director of Benefits and Communications, requested examples of the old and new methods of calculating benefits. (Def. Exh. A(1), Rose Aff.,

Exh. F, Bates No. 004729-30; LR56.1(a) P 198) In a letter dated February 26, 1985, Perry states:

> To illustrate, assume that the Sullair plan has two participants with identical service and salary histories. Each participant has a total accrued benefit (ignoring ESOP offsets) of $ 300.00 and a total expected benefit of $ 400.00. The current ESOP value for each participant is $ 20,000.00.
>
> At age 59, Employee A terminates, withdraws his ESOP value and invests it at 10% compounded annually, resulting in an account balance of $ 35,431.22 when he becomes age 65.
>
> Under our old calculation method, the offset to his total accrued benefit of $ 300 would equal $ 20,000 divided by an age 59 purchase rate ($ 115.87) or $ 172.61. In other words, at age 65, he would have an account value of $ 35,431.22 plus a monthly benefit of $ 127.39 ($ 300.00 less $ 172.61).
>
> Employee B continues to work until age 65. His ESOP value is also increasing by 10% compounded annually. At age 65, he takes his ESOP value (now $ 35,431.22) in cash. The offset to his total expected benefit equals $ 35,431.22 divided by an age 65 purchase rate ($ 103.08), or $ 343.73. Thus, at age 65, he has an account value of $ 35,431.22 just like Employee A, but his monthly benefit is only $ 56.27 ($ 400 minus $ 343.73). In effect, he is penalized for his continued employment.

> To avoid the inequity, we use deferred rates to calculate the offset for terminated employees who are not eligible to receive retirement benefits at the time of their termination.
>
> ***
>
> Using the deferred age 59 rate for Employee A results in an offset of $ 339.62 ($ 20,000 divided by $ 58.89) and no additional benefit payable at age 65.

(Def. Exh. A(1), Rose Aff., Exh. H, Bates No. 004732-33)

Sundstrand's in-house actuary, Eblen, told the members of the Plan Benefit Committee about this issue and requested that the committee approve the use of deferred annuity rates. (Def. Exh. A(1), Rose Aff., Exh. N, Bates No. 005233-34; LR56.1(a) P 203) The Plan Benefit Committee approved this approach at a meeting held on May 23, 1985. (Def. Exh. A(1), Rose Aff., Exh. Q; LR56.1(a) P 204)

When the Plan Benefit Committee again faced this issue in 1995 because of White's claim, it reconfirmed its 1985 interpretation that deferred annuity rates should be used for calculating the ESOP offset. (LR56.1(a) P 209, 212-14; Def. Exh. C(3), Eitenmiller dep. exh. 13, Bates No. 002518) On appeal, the Appeal Review Committee noted that using an immediate annuity rate would result in a lesser offset and, therefore, a greater pension benefit because it would not account for the time value of money from the vested deferred participant's employment termination to benefit commencement. (Def. Exh. C(3), Eitenmiller dep., Exh. 5, Bates No. 000004) The Appeal Review Committee also noted the past practice of using deferred annuity rates, and upheld the Plan Benefit Committee's decision. See also Def. Exh. C(6), Ricketts dep. Exh. 26, Bates No. 002548-51.

Plaintiffs argue using a deferred annuity rate to age 62 or age 65 has the effect of adding interest on the ESOP balance

(even though the participant took that balance with him or her upon leaving Sullair), thereby decreasing the participant's retirement benefits. Nonetheless, plaintiffs' argument does not show defendants' interpretation is downright unreasonable. Plaintiffs have not produced any evidence refuting Bankers' Life's point, as Perry demonstrated in her letter dated February 26, 1985, that use of an immediate annuity rate penalizes the long-term Sullair employee. A desire to protect long-term employees is consistent with the goals of any pension plan.

Plaintiffs argue defendants acted arbitrarily in relying on Bankers' Life's recommendation to use a deferred annuity rate. In so arguing, plaintiffs rely on the following Plan language:

> The Plan Administrator will be entitled to rely upon all tables, valuations, certificates and reports furnished by the consultant or actuary appointed by the Plan Administrator and upon all opinions given by any counsel selected or approved by it.

1981 Plan, § 8.01; 1984 Plan, § 8.01.

Plaintiffs interpret Bankers' Life's recommendation to be an opinion, and they argue defendants were constrained by Plan language to rely only on the opinion of legal counsel. The court does not read section 8.01 as forbidding defendants from relying on Bankers' Life's recommendation, and rejects plaintiffs' restrictive reading of the Plan language.

In an attempt to show defendants' interpretation is arbitrary and capricious, plaintiffs point to the Porter letter. In the letter, Porter states:

Your first question involves the manner in which Bankers Life proposes to calculate the offset under the retirement plan for the value of ESOP benefits in the case of participants who terminate employment prior to retirement. I do not agree with the manner in which Bankers Life proposes to calculate the offset. What is contemplated by the retirement plan in the case of a terminated participant with a right to a deferred vested annuity is that such participant be vested in his accrued benefit under the plan determined at the date of his termination of employment, and moreover, the date of his termination of employment is the "specified date" for purposes of determining the value of his ESOP benefit, as you indicate in your letter. The third amendment to the plan added a definition of "ESOP benefit" for purposes of making this calculation. That definition provides that the ESOP benefit is the fair market value of the participant's vested interest as of any particular date and provides further that, if the participant had previously received a distribution from the ESOP, the value of that distribution is to be added back into the participant's ESOP account. This adding back of any prior distribution, however, is applicable only to situations where the participant had made a withdrawal of benefits under the ESOP prior to the date his ESOP benefit is being determined. It was not intended and, in my view, does not require the attributing of future earnings or growth to the ESOP account for purposes of determining the offset to be applied to a deferred vested retirement plan benefit, particularly in view of

> the fact that the deferred vested retirement plan benefit is the participant's accrued benefit at the date of his termination of employment.

(Pl. Exh. 1, Bates No. 112006-07)

Plaintiffs assert, without support, that Porter's letter addresses the use of deferred versus immediate annuity rates, and is disagreeing with Bankers' Life's recommendation. However, this is not apparent from a reading of the letter. Defendants have produced an affidavit from Porter wherein he states his letter does **not** address this issue. The paragraph quoted above, according to Porter, addresses the timing of the determination of a participant's ESOP account, not the "entirely separate issue" of what annuity rates prevailing at the time of a participant's termination should be used. (Def. Exh. F, Porter Aff., P 8)

Plaintiffs also point to a written chronology of events, prepared by Robert Quick, Sundstrand's in-house legal counsel, as evidence showing defendants' use of a deferred annuity rate is arbitrary and capricious. In his chronology, Quick writes of a meeting he, along with two other individuals, had with David Ellis, an attorney, on July 18, 1995. Therein, Quick writes, "All issues discussed, with Ellis expressing his opinion that we would not have a successful outcome if White and the others carry forward their claims." However, plaintiffs offer absolutely no evidence what a vague reference to "all issues discussed" or "claims" meant. White won the bulk of his claims, and Ellis could have been referring to those claims. Plaintiffs' argument is based on sheer speculation and is rejected. *Pettit v. Retrieval Masters Creditors Bureau, Inc., 211 F.3d 1057, 2000 WL 558945*, at *3 (7th Cir. 2000) (at summary judgment stage nonmoving party must do more than merely speculate).

Plaintiffs also rely on the opinion of their expert witness, Albert Grasso. (Pl. Resp., p. 8) Grasso states he concurs with

Porter and Ellis, and that in his opinion, the failure of the Plan fiduciaries to implement Porter's advice is arbitrary and capricious. (Id.) However, Grasso's opinion regarding the ESOP offset issue suffers from the same defects as his opinion regarding profit sharing payments. His opinion completely lacks any analysis, is apparently based in whole or in part on Porter's original letter - later clarified as inapplicable by Porter, and, therefore, has no evidentiary support.

Plaintiffs point to a memo Eblen wrote and a memo Quick wrote as evidence of bias. (LR56.1(b)(3)(B) P 3, 29) The court finds neither is sufficient to raise a question of material fact about whether defendants' interpretation of the Pension Plan is arbitrary and capricious. Eblen's memo was written in 1997, approximately two years after the Plan Benefit and Appeal Review Committees decided his claim. As for Quick's memo, although he states White was "carping," he also acknowledges White won the bulk of his pension appeal. The memo simply is not evidence of actual bias under these circumstances.

5. Interest Rate

Plaintiffs allege defendants did not use the proper interest rate when it granted retroactive adjustments and make-whole payments. (Compl. P 53-60) The applicable make-up interest rate under the 1981 Plan was first considered in connection with the claim of another participant, Donald Hoodes. (LR56.1(a) P 238) Hoodes claimed the applicable make-up interest rate should be ten percent. (Id.) On August 20, 1992, the Plan Benefit Committee rejected this claim and decided the interest rate used would be the prevailing yield on United States Treasury one-year notes ("U.S. Treasury rate"). (Id. P 239) Hoodes appealed. The Appeal Review Committee received advice from the Sullair Plan's outside actuaries regarding the appropriateness of using the U.S. Treasury rate. (Id. P 241) The actuary opined that the U.S. Treasury rate

was appropriate and Hoodes' proposed rate was not. (Id.) As a result, on November 18, 1992, the Appeal Review Committee upheld the Plan Benefit Committee's decision. (Id. P 243) Hoodes did not appeal this decision further and accepted recalculations which included make-up payments using the U.S. Treasury rate.

Defendants initially argue plaintiffs have not exhausted the appeal process regarding this claim. (Def. Memo., p. 12) The court rejects this argument. There is evidence White raised the issue in a meeting with Quick in April, 1995. See Pl. Exh. 14, Bates No. 012758; Pl. Exh. 19, Bates No. 012762. Nevertheless, the court finds plaintiffs have not shown defendants' interpretation of the Pension Plan to authorize using the U.S. Treasury rate for make-whole payments is arbitrary and capricious. In their response brief, plaintiffs' argument regarding this issue is most uninformative. (Pl. Resp., p. 5) Plaintiffs cite to no Plan language which would dictate a different rate, nor do they even clearly articulate what interest rate should be used. Apparently, the thrust of plaintiffs' argument is that the U.S. Treasury rate simply is not "fair." See, e.g., Pl. Exh. 19, Bates No. 012762. This is not a sufficient basis for showing defendants' interpretation is arbitrary and capricious, particularly given that Sullair Plan actuaries previously approved the appropriateness of using the U.S. Treasury rate. (LR56.1(a) P 241)

B. Count II

In Count II, plaintiffs allege defendants (other than the Plan), breached their fiduciary duties by failing to implement changes in the calculation of benefits for similarly situated participants, failing to implement the Pension Plan solely in the interests of the participants and beneficiaries, failing to investigate claims, and failing to comply with ERISA's reporting and disclosure requirements. (Compl. P 73) The

prayer for relief in Count II mirrors the prayer for relief in plaintiffs' other claims.

The court agrees with defendants that plaintiffs cannot maintain their breach of fiduciary claim pursuant to section 502(a)(3), *29 U.S.C. § 1132*(a)(3), because they can avail themselves of section 1132's other remedies. *Varity Corp. v. Howe, 516 U.S. 489, 515, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996)* (where Congress elsewhere provided adequate relief, there will likely be no need for further equitable relief); *Wilkins v. Baptist Healthcare Sys., Inc., 150 F.3d 609, 615 (6th Cir. 1998); Tolson v. Avondale Indus., Inc., 141 F.3d 604, 610 (5th Cir. 1998); Wald v. Southwestern Bell Corp. Customcare Med. Plan, 83 F.3d 1002, 1005-06 (8th Cir. 1996); Perlman v. Swiss Bank Corp., 916 F. Supp. 843, 844 (N.D. Ill. 1996); Frank v. Ameritech Corp., 1999 U.S. Dist. LEXIS 17236,* No. 98 C 5506, *1999 WL 1011107,* at *4 (N.D. Ill. Oct. 12, 1999); *Renaldi v. Sears Roebuck and Co., 1999 U.S. Dist. LEXIS 1303,* at *27-29, No. 97 C 6057 (N.D. Ill. Jan. 25, 1999); cf. *Amweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 992 (7th Cir. 1993).*

Plaintiffs argue section 502(a)(1)(B) alone cannot give them the remedies they seek, Pl. Resp., p. 16, yet they seek no different relief in Count II as compared to Count I. That plaintiffs were unsuccessful with their denial of benefit claims under section 1132(a)(1)(B) does not make their breach of fiduciary duty claim under section 1132(a)(3) viable. *Tolson, 141 F.3d at 610; Renaldi, 1999 U.S. Dist. LEXIS 1303,* at *29.[8]

C. Count III

In Count III, plaintiff White alleges the fiduciary defendants initially granted his claim that regular profit sharing payments would be included in the calculation of his pension benefits, then reversed their decision after White asked them to make the same adjustment for all eligible Plan

participants. (Compl. P 75-76) White alleges such conduct is prohibited retaliation under section 510 of ERISA. See *29 U.S.C. § 1140.*

Defendants have procured evidence which shows none of the plaintiffs exhausted any administrative remedies with respect to a retaliation claim. See LR56.1(a) P 285; Def. Exh. A(2), Kramer Aff., P 8. Although plaintiffs state White raised this claim during the administrative process, see Pl. Resp., p. 11, they have offered absolutely no evidence to support their statement. In fact, the court's review of plaintiffs' submissions shows the absence of any reference to a retaliation claim. See, e.g. Pl. Exh. 6 (no mention of any retaliatory conduct); Pl. Exh. 14 (same); Pl. Exh. 19 (same); Pl. Exh. 22 (same). The court finds plaintiffs' failure to exhaust their administrative remedies with respect to any retaliation claim bars them from going forward on Count III. See *Lindemann v. Mobil Oil Corp., 79 F.3d 647, 649-51 (7th Cir. 1996)* (upholding lower court's application of exhaustion requirement to ERISA retaliation claim); *Kross v. Western Elec. Co., 701 F.2d 1238, 1243-45 (7th Cir. 1983).* While plaintiffs may be correct in that section 502(a) does not require issue or theory exhaustion, ERISA requires claim exhaustion. See *Wolf v. National Shopmen Pension Fund, 728 F.2d 182, 186 (3rd Cir. 1984).* Count III is not a variation of a theory previously advanced during the administrative review process but, rather, is a new claim.

A court may excuse a plaintiff's failure to exhaust administrative remedies (1) if there has been a lack of meaningful access to the review procedures or (2) if exhaustion of internal remedies would be futile. *Robyns v. Reliance Standard Life Ins. Co., 130 F.3d 1231, 1236 (7th Cir. 1997).* To fall under the futility exception a plaintiff must show it is certain her claim will be denied on appeal, not merely that she doubts an appeal will result in a different decision. *Lindemann, 79 F.3d at 650.* Here, plaintiffs argue the futility argument applies, yet they have offered no

evidence to support their argument. On the contrary, after the Plan Benefit Committee reversed its initial decision and excluded profit sharing payments from White's pension benefits, the Appeal Review Committee reversed that decision and ordered that profit sharing payments be included in the calculation of White's pension benefits.

Even if the court found exhaustion under the circumstances, it would still find in defendants' favor. Section 510 makes it unlawful for an employer

> to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

28 U.S.C. § 1140. The Seventh Circuit has interpreted section 510 to apply only in instances in which an employer wrongfully alters the employment relationship to prevent benefit rights from vesting. *Lindemann v. Mobil Oil Corp., 141 F.3d 290, 295 (7th Cir. 1998); Andersen v. Chrysler Corp., 99 F.3d 846, 856 (7th Cir. 1996); Teumer v. General Motors Corp., 34 F.3d 542, 544 (7th Cir. 1994); Deeming v. American Standard, Inc., 905 F.2d 1124, 1127 (7th Cir. 1990).* A fundamental prerequisite to a section 510 action is an allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way. *Deeming, 905 F.2d at 1127.* Here, no employment relationship was implicated in White's retaliation claim, and judgment is entered in defendants' favor on this ground as well. See *Andersen, 99 F.3d at 856.*

In arguing that the employer-employee relationship is not a necessary prerequisite to a section 510 claim, plaintiffs rely on case law from other circuits. See, e.g., *Mattei v. Mattei, 126 F.3d 794 (6th Cir. 1997)*, cert. denied, *523 U.S. 1120, 140 L. Ed. 2d 939, 118 S. Ct. 1799 (1998)*. As those circuits do not appear to be in line with the Seventh Circuit, the court declines to follow them. See *Cencula v. John Alden Life Ins. Co., 1998 U.S. Dist. LEXIS 16140*, No. 98 C 0562, *1998 WL 719937*, at *3-4 (N.D. Ill. Oct. 6, 1998) (noting difference between Seventh Circuit and other circuits regarding interpretation of section 510 and declining to follow other circuits).

D. Count IV

Count IV is based on defendants' alleged failure to comply with various ERISA reporting and disclosure provisions. (Compl. P 77-88) Plaintiffs' seriousness about Count IV is questionable because they give short shrift to this claim in their response brief. Given the highly technical nature of ERISA's reporting and disclosure requirements, it is highly unlikely plaintiffs have carried their burden of showing the specific provisions defendants violated. Defendants have raised various defenses to Count IV in their motion for summary judgment and plaintiffs do not address the majority of their arguments. Nevertheless, the court finds there appears to be material issues of fact regarding defendants' statute of limitations defense. Neither side has adequately shown when the alleged reporting and disclosure violations occurred, rendering application of any limitations period impossible.

On the other hand, plaintiffs offer no response to defendants' argument that technical violations of ERISA's notification provisions ordinarily do not provide a basis for monetary relief absent a showing of bad faith, active concealment or detrimental reliance, and the court finds this

argument has support in the case law. See *Ames v. American Nat'l Can Co., 170 F.3d 751, 759-60 (7th Cir. 1999); Andersen v. Chrysler Corp., 99 F.3d 846, 859 (7th Cir. 1996); Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 789 (7th Cir. 1996); Murphy v. Keystone Steel & Wire Co., 61 F.3d 560, 569 (7th Cir. 1995); Meredith v. Allsteel, Inc., 11 F.3d 1354, 1360 (7th Cir. 1993),* rev'd on other grounds, *96 F.3d 1033 (7th Cir. 1996); Kreutzer v. A.O. Smith Corp., 951 F.2d 739, 743 (7th Cir. 1991).*

Here, no such showing has been made. It is clear from the record that many of the alleged reporting problems are the result of problems with records Sundstrand inherited from Sullair and/or Bankers' Life. For example, White was not receiving mailings from Sundstrand because they had no record of him being a participant with an entitlement to a benefit. (LR56.1(a) P 305) The records for the Sullair Plan showed White had no benefit entitlement because his pension benefit had been fully offset by his ESOP Offset. (Id.) Likewise, there was a long delay between when Vanderslice requested a calculation of his pension benefits and when defendants responded to him because Sundstrand employees had tremendous difficulty calculating his benefits due to a lack of information. Thus, the court finds in favor of defendants on Count IV as well.

Conclusion

For the reasons set forth above, plaintiffs' motions to strike are granted in part and denied in part. Defendants' responses ("Part One" of its LR56.1(a)(3)(B) statement) are stricken, as is its statement of additional facts (pages 120-155 of its LR56.1(a)(3)(B) statement). The affidavits of Levy and Kelly are stricken, as are the corresponding portions of defendants' reply briefs. Defendants' amended motion in limine is denied and plaintiffs' motion to strike in relation to defendants' motion in limine is denied as moot. Defendants'

motion for summary judgment is granted and this cause is dismissed in its entirety.

ENTER:

PHILIP G. REINHARD, JUDGE

UNITED STATES DISTRICT COURT

DATED: May 23, 2000

Footnotes

[1] The court's job was further complicated by defendants' habit of using some kind of macro for many of their citations, whereby only some, but not all, of the citations contained therein supported a sentence.

[2] For example, the citation in support of LR56.1(b) P 12 should be to exhibit 9, and the citation in support of LR56.1(b) PP 15, 16 should be to exhibit 23.

[3] Defendants' argument regarding Grasso's allegedly false testimony goes to his credibility, an issue the court does not address at the summary judgment stage.

[4] This section contains general background facts. More detailed facts specific to each issue will be included in subsequent sections of this opinion.

[5] From 1992 until 1996, Bankers' Life's assistance was limited to helping Sundstrand reconstruct old rates and calculations. (LR56.1(a) P 67)

[6] The parties agree the only profit sharing payments which could be at issue are profit sharing payments made in 1980 and 1981, as Sullair made no profit sharing payments after 1981. (LR56.1(a) P 88)

[7] In their response brief, plaintiffs cite to an exhibit which does not support their statement. (Plaintiffs cite to exhibit 6, which is a letter dated July 11, 1995, from White to Quick.)

[8] It does not appear plaintiffs base Count II on *29 U.S.C. § 1132*(a)(2). In any event, they have not stated a claim pursuant to this section. See Massachusetts Mut. life *Ins. Co. v. Russell, 473 U.S. 134, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985).*

No. 98 C 50070

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

WILLIAM R. WHITE, JOHN G. GREENWOOD, RICHARD H. SCHLOBOHM, ROBERT D. SAMPSON, DAVID E. DAUM, MARTIN A. GRANO, WILLIAM M. VANDERSLICE, BORJE H. VAGENIUS, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

SUNDSTRAND CORPORATION, SUNDSTRAND CORPORATION RETIREMENT PLAN-INDUSTRIAL, BARBARA J. KRAMER, DOUGLAS EBLEN, PLAN BENEFIT COMMITTEE, JAMES F. RICKETTS, KENNETH EITENMILLER, HAZEN TUCK, PLAN APPEAL REVIEW COMMITTEE,
Defendants.

September 30, 1999, Decided

September 30, 1999, Filed

COUNSEL:
For PLAINTIFF: Lawrence Walner, Lawrence Walner & Associates, Ltd., Chicago, IL.

For PLAINTIFF: Michael R. Grimm, Clausen Miller P.C., Chicago, IL.

For PLAINTIFF: Suzanne McCarthy, Chuhak & Tecson, Chicago, IL.

For DEFENDANT: Peter M. Kelly, Ogletree, Deakins, Murphy, Smith & Polk, P.C., Chicago, IL.

JUDGES:
PHILIP G. REINHARD, JUDGE, UNITED STATES DISTRICT COURT.

OPINIONBY:
PHILIP G. REINHARD

OPINION:

MEMORANDUM OPINION AND ORDER

Introduction

Plaintiffs have brought a four-count complaint pursuant to the Employee Retirement Income Security Act of 1974, *29 U.S.C. § 1001* et seq. ("ERISA"), against Sundstrand Corporation, the Sundstrand Corporation Retirement Plan-Industrial ("Pension Plan"), the Plan Benefit Committee and its members, and the Plan Appeal Review Committee and its members. (Compl. P 13-15) Plaintiffs allege the Pension Plan is an employee pension benefit plan within the meaning of *29 U.S.C. § 1002*(2) and is a defined benefit pension plan within the meaning of *29 U.S.C. § 1002* (35). (Compl. P 14)

Plaintiffs seek class certification of the following classes:

> . ***Class A:*** All current or former employees of Sullair and/or Sundstrand and their respective beneficiaries, who were participants in the Pension Plan and whose retirement benefits were not calculated to include all compensation subject to FICA tax.
>
> . ***Class B:*** All current or former employees of Sullair and/or Sundstrand and their respective

> beneficiaries, who were participants in the Pension Plan and whose retirement benefits were improperly calculated because the ESOP offset has not been calculated in accordance with the written terms of the Pension Plan.
>
> . ***Class C:*** All current or former employees of Sullair and/or Sundstrand and their respective beneficiaries, who were or are participants in the Pension Plan from 1992 to the present.

(Compl. P 19) Each of the proposed class definitions are limited to current and former employees who are or were participants in that portion of the Sundstrand Corporation Retirement Plan-Industrial formerly known as the Sullair Corporation Retirement Plan. (Reply, p. 3 n.3)

Plaintiffs seek to have named plaintiffs Vanderslice and Greenwood appointed as class representatives of class A, and named plaintiff White appointed as class representative of classes B and C. Plaintiffs also seek an order appointing plaintiffs' counsel as counsel for the class. (Pl. Memo., p. 1-2) In Count I, brought pursuant to *29 U.S.C. § 1132*, the proposed members of classes A, B and C allege the Pension Plan fiduciaries breached the written terms of the pension plan. (Compl. PP 68-71) Count II, brought by the proposed members of classes A, B and C, is a breach of fiduciary duties claim. Count III is a § 510 retaliation claim. See *29 U.S.C. § 1140*. In Count IV, plaintiffs allege defendants failed to comply with ERISA's reporting and disclosure requirements.[1]

Facts

Sullair Corporation ("Sullair") became a wholly owned subsidiary of Sundstrand Corporation in 1984. (Compl. P 11) Sundstrand restated Sullair's Pension Plan in 1985 and made it retroactive to January 1, 1984. (Id. P 35) Since Sundstrand

began administering the Pension Plan, a dispute has arisen as to what should be included in the definition of "compensation" for purposes of calculating pension benefits.

Specifically, White filed a claim with the Pension Plan fiduciaries, claiming that regular profit sharing payments, director's fees, mortgage interest assistance and relocation expenses should have been included in the calculation of his pension benefits. (Id. P 37) Plaintiffs allege the Retirement Plan Benefit Committee originally agreed to include these payments, but later rescinded the grant of White's claim after he told the committee it should recalculate benefits for all plan participants. (Id. P 38-40) On appeal, the Appeals Review Committee granted White's claim. (Id. P 43)

As to all plan participants, defendants state the pension calculations of all plan participants have been recalculated to include director's fees, mortgage assistance payments and moving expenses, if applicable. Although plaintiffs allege that defendants have continued to deny the inclusion of profit sharing payments in its calculations, it appears defendants have included post-1983 profit sharing payments. However, it has not included profit sharing payments in its calculations for those individuals who left Sullair prior to January 1, 1984. Plaintiffs Greenwood, Schlobohm, Sampson and Vagenius are plan participants who left the company prior to January 1, 1984. Of those plan participants plaintiffs admit have had their pension benefits recalculated, plaintiffs dispute the interest rate defendants applied to lump sum and make whole payments. (Compl. PP 53-61)

White also raised an issue regarding an additional alleged miscalculation of his pension benefits based on section 4.02 of the Pension Plan, which plaintiffs refer to as the "ESOP offset claim." Section 4.02 of the Pension Plan states that a participant's accrued benefit is reduced as follows:

> The amount of monthly pension which could be provided on a straight life annuity basis by application of an amount equal to the fair market value as of such specified date of the Participant's vested interest in the balance credited to his account under the Sullair Corporation Employee Stock Ownership Plan, and, for this purpose, such amount of monthly pension shall be determined on the basis of the annuity purchase rates in effect as of such specified date under and as set forth in the Group Contract.

(Compl. P 46)

White, who designed this section, disagrees with how the Pension Plan fiduciaries have interpreted section 4.02 in calculating the ESOP offset. (Compl. P 48)

In short, with respect to calculating benefits in accordance with the terms of the Pension Plan, plaintiffs allege: (1) the pension benefits are not calculated using all compensation subject to FICA tax; (2) the ESOP offset is not being properly calculated for those vested participants who terminated employment before reaching the age at which they were eligible to immediately begin receiving retirement benefits under the Pension Plan; and, (3) make whole payments which were made to plan participants after the January 1, 1989 restatement of the Pension Plan should have been calculated using an 8-1/2 percent interest rate allegedly set forth in the Pension Plan. (Compl. P 69-71)

Preliminary Matters

In their memorandum in response to plaintiffs' motion for class certfication, defendants attempt to incorporate their motion to dismiss and memorandum in support therein by reference. (Def. Memo. p. 5 n.3, p. 11) The court rejects defendants' attempt to so incorporate, for several reasons.

First, it is improper to attempt to incorporate a 20-page memorandum regarding a motion to dismiss into a 20-page memorandum regarding class certification and expect the court to sift out those arguments applicable to the latter. Second, the court already ruled on defendants' motion, in its order dated December 1, 1998. In fact, in light of the court's previous ruling, it is puzzling why defendants urge the court to rule on at least a portion of their motion to dismiss (Def. Memo., p. 13 n.7) prior to addressing class certification. Thus, the court will consider only those arguments appearing in defendants' response to plaintiffs' motion for class certification.

Discussion

A litigant seeking to maintain a class action must first meet the prerequisites of "numerosity, commonality, typicality, and adequacy of representation" set forth in Rule 23(a). *Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 613, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997); General Tel. Co. v. Falcon, 457 U.S. 147, 156, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982).* Once these four prerequisites are met, the potential class must also satisfy at least one provision of Rule 23(b). *Rosario v. Livaditis, 963 F.2d 1013, 1017 (7th Cir. 1992),* cert. denied, *506 U.S. 1051, 122 L. Ed. 2d 127, 113 S. Ct. 972 (1993).* A class determination generally involves both factual and legal issues, and may require a probing behind the pleadings to determine whether the interests of absent parties are fairly encompassed within the named party's claim. *Falcon, 457 U.S. at 160.*

Under the first factor enumerated in Rule 23(a), a proposed class must be so numerous that joinder is impracticable. Fed.R.Civ.P. 23(a)(1). In determining whether joinder is impracticable, the court considers a number of factors, including the size of the class, the geographic dispersion of its members, the nature of relief sought, the ability of the litigants to press their own claims, and the

practicability of forcing relitigation of a common core issue. *Rosario v. Cook County, 101 F.R.D. 659, 661 (N.D. Ill. 1983).* Commonality, the second factor under Rule 23(a), requires that there be questions of law and fact common to the class. *963 F.2d at 1017.* Some factual variation among the class claims will not defeat a class action. Id. "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Id. at 1018.*

Typicality is closely related to commonality and these two factors tend to merge. *Falcon, 457 U.S. at 157 n.13; Rosario, 963 F.2d at 1018.* A claim is typical if "'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.'" Id. (*quoting De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)).* Even if based on the same legal theory, the claims must all contain a common core of allegations. *Allen v. City of Chicago, 828 F. Supp. 543, 553 (N.D. Ill. 1993).*

Rule 23(a)(4), adequacy of representation, seeks to uncover conflicts of interest between named parties and the class they seek to represent. *Windsor, 521 U.S. at 625.* This factor is comprised of two parts: (1) the adequacy of the named plaintiffs' counsel; and, (2) the adequacy of representation provided in protecting the different, separate and distinct interests of the class members. *Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 598 (7th Cir. 1993).* Representatives must be part of the class and possess the same interest and suffer the same injury as the class members. *Windsor, 521 U.S. at 625-26.*

A. Class A - Counts I and II

1. Rule 23(a)

a. Numerosity

Plaintiffs define class A as including all current or former employees of Sullair and/or Sundstrand and their respective beneficiaries, who were participants in the Pension Plan and whose retirement benefits were not calculated to include all compensation subject to FICA tax. There are four types of compensation at issue in Count I: profit sharing, moving expenses, mortgage assistance and directors' fees. (Reply, p. 1)

Regarding numerosity, plaintiffs estimate there were at least 23 participants who would have qualified to receive profit sharing, at least five participants who received moving expense reimbursements and at least seven participants who received directors' fees. (Pl. Memo., p. 6) Under defendants' interpretation of plaintiffs' claims, there are a maximum of 53 profit sharing claimants, eight participants who were eligible to receive mortgage interest assistance, 50 employees who received moving expense reimbursement and eight individuals who received directors' fees from Sullair. (Def. Memo., p. 8-9)

The court finds plaintiffs have established numerosity with regards to the plan participants asserting a claim based on pre-1983 profit sharing payments. See *Lemke v. Suntec Indus., Inc., 1997 U.S. Dist. LEXIS 19638*, at *7-8, No. 94 C 50006 (N.D. Ill. Dec. 1, 1997) (Reinhard, J.) (in evaluating ERISA breach of plan terms claim, 22 to 35 potential members sufficient to show class so numerous as to make joinder impracticable). Evidence also shows potential class members are scattered across the country and/or the world, further rendering joinder impracticable. For example, proposed class representatives Greenwood, Schlobohm, Sampson and Vagenius alleged profit sharing payments had

been improperly excluded from their compensation. (Compl. P 44) Greenwood resides in Connecticut, Schlobohm resides in Australia, Sampson resides in New Jersey and Vagenius resides in Indiana.

However, the court finds plaintiffs have not established numerosity with respect to those plan participants asserting claims based: on post-1983 profit sharing payments, mortgage interest assistance, moving expense reimbursement, and directors' fees. Such claims are moot because the pension benefits of the majority of plan participants were recalculated to include such monies in the definition of compensation. According to defendants, the Plan Benefit Committee and Appeal Review Committee concurred with the claims that post-1983 profit sharing, moving expenses, mortgage assistance and director's fees should be counted. (Def. Memo., p. 11) With the exception of seven former employees, the plan participants' benefits were recalculated.

Plaintiffs argue defendants' mootness issue goes to the merits of their claims and should not be considered at this stage. The court disagrees. Mootness principles affect class certification. See *Davis v. Ball Mem'l Hosp. Ass'n, 753 F.2d 1410 (7th Cir. 1985).* Plaintiffs also argue defendants have not conducted a thorough search to determine whether all plan participants have been identified. (Reply, p. 9) Nevertheless, at this time the court finds plaintiffs have not established numerosity with respect to potential class members asserting claims based on post-1983 profit sharing, moving expenses, mortgage assistance and directors' fees.[2]

b. Commonality, Typicality

The court finds the commonality and typicality requirements have also been met with respect to the proposed class A members with claims involving pre-1983 profit sharing payments. See *Lemke, 1997 U.S. Dist. LEXIS 19638,* at *9; *Gerlib v. R.R. Donnelley & Sons Co., 1997 U.S. Dist. LEXIS 16842,* at *17-18, No. 95 C 7401 (N.D. Ill. Oct. 24,

1997) (proposed ERISA claims regarding entitlement to pension benefits satisfied Rule 23 commonality and typicality factors). Defendants argue at least seven major distinct versions of the Sullair Plan are at issue. (Def. Memo., p. 4) Plaintiffs argue the terms at issue are unchanged by any of the various versions, except one. (Reply, p. 4) The court finds any difference in the plans does not render the claims of the proposed members atypical or lacking in commonality. *Lemke, 1997 U.S. Dist. LEXIS 19638,* at *9; *Gerlib, 1997 U.S. Dist. LEXIS 16842,* at *18 (each claim for benefits was under a distinct plan and satisfied typicality requirement). The court's decision to limit class A to plan participants who are asserting claims based on pre-1983 profit sharing payments should minimize defendants' concerns. In any event, the answer to defendants' argument would be to create subclasses, not deny class certification altogether. See Fed.R. Civ.P. 23(c)(4).

Regardless, plaintiffs' principal claim focuses on the extent of defendants' obligation to provide pension benefits and whether, in calculating such benefits, pre-1983 profit sharing payments should have been included. See *Lemke, 1997 U.S. Dist. LEXIS 19638,* at *9; *Gerlib, 1997 U.S. Dist. LEXIS 16842,* at *18. Defendants' argument regarding individualized damages, (Def. Memo., p. 6-9) is unpersuasive. That there might be a need for an individual calculation of damages as to particular members of the class does not defeat commonality or typicality, nor does the factual variations as to particular pension benefits. *Lemke, 1997 U.S. Dist. LEXIS 19638,* at *9. The court finds commonality and typicality has been established with respect to proposed members of class A who are asserting claims based on pre-1983 profit sharing payments.

c. Adequacy of Representation

As stated above, the test for determining adequacy of representation is twofold: (1) counsel for the named plaintiffs

must be competent; and, (2) the named plaintiffs must have a sufficient interest in the outcome of the case to ensure protection of the different, separate and distinct interests of the class members, while having no interests antagonistic to the interests of the class. *Retired Chicago Police Ass'n, 7 F.3d at 598.* Here, defendants do not challenge the competency of plaintiffs' counsel and plaintiffs' counsel has demonstrated their competence in handling this type of class action throughout these proceedings.

Defendants argue, however, that conflicts of interest exist between the named parties and the class they seek to represent, because the remedial interests of those within the proposed class are not aligned. (Def. Memo., p. 14) Defendants argue there is an obvious conflict between current employees who are eligible for Plan features, such as the 8 1/2 percent interest rate specified in 1989 and later versions of the Plan, and plan participants who terminated employment prior to that date. Even accepting defendants' interpretation of the relevant Plan documents, defendants' argument is unpersuasive. Differences in pension coverages are insufficient to show inadequacy. See *Lemke, 1997 U.S. Dist. LEXIS 19638,* at *10.

2. Rule 23(b)(2),(3)

A class action which meets all four of the requirements under Rule 23(a) must also qualify under one of the subsections of Rule 23(b). Here, plaintiffs seek class action status pursuant to Rule 23(b)(2) or (3). Under Rule 23(b)(2), plaintiffs must show defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Fed.R.Civ.P. 23(b)(2). Injunctive or declaratory relief must be the predominant remedy requested for the class members. *Lemke, 1997 U.S. Dist. LEXIS 19638,* at *11. This limitation does not automatically preclude the recovery of monetary

awards, provided that monetary relief is either a part of the equitable relief granted or is secondary to the predominant injunctive or declaratory relief. Id.

Under subsection (b)(3), the court must find questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Framed for situations in which class-action treatment is not as clearly called for as it is under subsections (b)(1) or (b)(2), subsection (b)(3) permits certification when a class suit may nevertheless be convenient and desirable. *Windsor, 521 U.S. at 615.* Special notice provisions apply if a class is certified pursuant to subsection (b)(3). Fed.R.Civ.P. 23(c)(2).

Here, the court finds Rule 23(b)(2) to be the applicable provision with respect to both Count I and II. See *Breedlove v. Tele-Trip Co., Inc., 1993 U.S. Dist. LEXIS 10278,* No. 91 C 5702, *1993 WL 284327,* at *9-11 (N.D. Ill. July 27, 1993); Accord *Church v. Consolidated Freightways, Inc., 1991 U.S. Dist. LEXIS 15419,* at *42-44, No. C-90-2290 DLJ (N.D. Cal. June 14, 1991); *Jansen v. Greyhound Corp., 692 F. Supp. 1022, 1028 (N.D. Ia. 1986); Bower v. Bunker Hill Co., 114 F.R.D. 587, 596 (E.D. Wash. 1986).* While plaintiffs are seeking monetary relief in Count I, the predominant purpose of the claim is to recalculate pension benefits, which is a form of injunctive or declaratory relief. *Breedlove, 1993 WL 284327,* at *9-10. Defendants have refused to include profit sharing payments as part of compensation for purposes of calculating benefits for those individuals who were employed between 1981 and 1983. (Def. Memo., p. 8) Their decision not to include such profit sharing payments are applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

Moreover, as for Count II, the only relief available for violations of breach of fiduciary duty under *29 U.S.C. §*

1109 is relief on behalf of the plan. *Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985).* This is because under section 1109, a plan participant or beneficiary may bring an action to remedy a breach of fiduciary duty only in a representative capacity, for which no individual relief is available. *Mertens v. Kaiser Steel Retirement Plan, 744 F. Supp. 917, 920 (N.D. Cal. 1990),* aff'd, *948 F.2d 1105 (9th Cir. 1991); Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co., 140 F.R.D. 474, 478-79 (S.D. Ga. 1991).* Thus, a breach of fiduciary duty claim is properly pursued as a class action. *Stanek v. AT & T, 1998 U.S. Dist. LEXIS 18717,* at *13 n.4, No. 96 C 4096 (N.D. Ill. Nov. 24, 1998). The court finds certification of Counts I and II is proper under Rule 23(b)(2).

B. Class B - Counts I and II

1. Rule 23(a)

a. Numerosity

Class B consists of all participants in the Pension Plan with ESOP account balances. Defendants apparently concede there are at least 162 individuals who fall within this proposed class. (Def. Memo., p. 10) The court finds the numerosity requirement of Rule 23(a) is satisfied. See *Lemke, 1997 U.S. Dist. LEXIS 19638,* at *7-8 (22 to 35 potential members sufficient to show class so numerous as to make joinder impracticable); *Diehl v. Twin Disc, Inc., 1995 U.S. Dist. LEXIS 7569,* at *7-8, No. 94 C 50031 (N.D. Ill. May 30, 1995) (Reinhard, J.) (120 potential members sufficient to satisfy numerosity); see also *Montgomery v. Aetna Plywood, Inc., 1996 U.S. Dist. LEXIS 4869,* at *12, No. 95 C 3193 (N.D. Ill. Apr. 15, 1996) (100 class members asserting ERISA claim involving ESOP satisfied numerosity requirement); *Breedlove, 1993 WL 284327,* at *3 (100-200 proposed class members asserting ERISA claim satisfied numerosity requirement).

b. Commonality, Typicality

Plaintiffs have also satisfied the commonality and typicality factors under Rule 23. Class B disputes the ESOP offset rate and involves an interpretation of Pension Plan language, an issue which is common to the class. See *Mathews v. Sears Pension Plan, 1996 U.S. Dist. LEXIS 5357,* at *9-10, No. 95 C 1988 (N.D. Ill. Apr. 22, 1996) (issue regarding what interest discount rate defendant should use involved common questions of law and fact); *Breedlove, 1993 WL 284327,* at *4 (issue of whether plan was misinterpreted by company in its denial of benefits was common to all potential class members). Whether defendants breached their fiduciary duties also involves questions of fact and law common to the class. *Montgomery, 1996 U.S. Dist. LEXIS 4869,* at *12-13.

Defendants apparently dispute whether a deferred annuity rate was used for all plan participants, in an attempt to defeat commonality and typicality. (Def. Memo., p. 10) However, defendants have offered no reason as to why plan terms would not have been uniformly applied to all plan participants. Regardless, their argument goes to the merits of plaintiffs' claims and is inapposite to the class certification issue.

c. Adequacy of Representation

Likewise, plaintiffs have satisfied adequacy of representation with respect to class B. Defendants argue in general that members of the class will conflict over the appropriate remedy, i.e., substantial immediate cash payments versus ensuring a well-protected fund for the future. (Def. Memo., p. 14) However, defendants' argument is unsupported. Statements by both parties reveal the Pension Fund is overfunded, and defendants have not pointed to any evidence showing a significant risk to the Fund if any monetary relief is ordered as a result of this lawsuit. Cf. *Montgomery, 1996 U.S. Dist. LEXIS 4869,* at *16-17.

Regardless, such facts to not create a conflict for purposes of a class action. See *Probe v. State Teachers' Retirement Sys., 780 F.2d 776, 781 (9th Cir. 1986)* (no conflict between currently retired teachers and teachers presently working, who would have to make larger contributions if court ordered higher benefits), cert. denied, *476 U.S. 1170, 90 L. Ed. 2d 978, 106 S. Ct. 2891 (1986); Gruby v. Brady, 838 F. Supp. 820, 826-27 (S.D.N.Y. 1993)* (certification of plaintiffs' claims not defeated by the presence of both retired and active members in proposed class); *Breedlove, 1993 WL 284327,* at *7 (possibility of increased benefits to former employees does not conflict with interests of current employees). It is not unusual, particularly in ERISA cases, for certified classes to contain current and former employees. *Montgomery, 1996 U.S. Dist. LEXIS 4869,* at *16-17. It is in all the class members' interest to prove a statutory violation and to obtain maximum relief. Id.; *Breedlove, 1993 WL 284327,* at *7.

Defendants also argue their counterclaim against White has created a conflict of interest between him and members of the proposed class, rendering the proposed class inadequately represented. (Def. Memo., p. 16-17)[3] The court rejects defendants' argument. If it turns out White is not a proper class representative, another member of the class could be selected as class representative in place of White. See *Robinson v. Sheriff of Cook County, 167 F.3d 1155, 1157 (7th Cir. 1999), cert. denied, 145 L. Ed. 2d 60, 1999 U.S. LEXIS 5091, 120 S. Ct. 71 (U.S. 1999).*

2. Rule 23(b)(2),(3)

For the same reasons as set forth above with respect to class A and their claims in Counts I and II, the court finds certification of class B and their claims in Counts I and II is proper under Rule 23(b)(2).

C. Class C - Counts I through IV

Plaintiffs define class C as all current or former employees of Sullair and/or Sundstrand and their respective beneficiaries, who were or are participants in the Pension Plan from 1992 to the present, and they estimate the proposed class includes 900 to 1,000 individuals. (Compl. P 24; Pl. Reply, p. 1) However, this is an extremely broad proposed class and plaintiffs have not clearly articulated the specifics of their claims in Counts I and II. See *Kross v. Western Elec. Co., Inc., 701 F.2d 1238, 1239 n.1 (7th Cir. 1983)* (court expressed grave doubts as to whether extremely broad class could be certified under Rule 23). At some point, the court may revisit the class certification issue regarding proposed class C and Counts I and II.

Likewise, the court denies the class certification issue regarding Count IV. Although certain allegations speak of individualized actions (see Compl. PP 78-82), other allegations imply across-the-board actions (see Compl. PP83-88). The court may revisit this issue at a later date, as well.

The court denies class certification with respect to Count III, the retaliation claim.[4] The allegations in the complaint center on White, and plaintiffs have not produced any evidence showing the alleged retaliation affected anyone other than White. In fact, the allegations in plaintiffs' complaint support just the opposite. For example, plaintiffs allege that when Donald Hoodes, the President and CEO of Sullair, filed a claim under the Pension Plan claim review procedure, his claim was allowed. (Compl. P 52) That White is seeking injunctive relief does not cure the individualized nature of Count III. *Stanek, 1998 U.S. Dist. LEXIS 18717*, at *11-14. Under the present circumstances, therefore, the court finds plaintiffs have not satisfied the factors under Rule 23(a) with respect to Count III. See *Mira v. Nuclear Measurements Corp., 107 F.3d 466, 475 (7th Cir. 1997); Stanek, 1998 U.S. Dist. LEXIS 18717*, at *11-14.

D. Defendants' Defense Based On An Alleged Release

In 1984, White entered a consulting agreement with Sullair, after his employment with the company had ended. (Def. Exh. N, Bates No. 2851-60) The agreement contained a release. (Id. Bates No. 2857) Defendants state other proposed members may have signed similar releases. (Def. Memo., p. 17; Def. Exh. O, Bates No. 6501-6544) Defendants argue the proposed classes do not distinguish between those who signed releases and those who did not, which precludes a finding that the class representatives' claims are typical of the class or that they can adequately represent the class. The court disagrees.

First, it is questionable whether White's agreement prohibits his present claims against Sundstrand. See Def. Exh. N, Bates No. 2858. Second, defendants have not produced releases signed by any other plaintiff. Third, typicality is determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members. *Wagner v. Nutrasweet Co., 95 F.3d 527, 534 (7th Cir. 1996)*(releases did not show lack of typicality).

Conclusion

For the reasons set forth above, plaintiffs' motion for class certification is granted in part and denied in part. With respect to Counts I and II, the court defines classes A and B as follows:

> . *Class A:* All current or former employees of Sullair and/or Sundstrand and their respective beneficiaries, who are or were participants in that portion of the Sundstrand Corporation Retirement Plan-Industrial formerly known as the Sullair Corporation Retirement Plan and whose compensation, for purposes of

calculating retirement benefits, did not include pre-1983 profit sharing payments.

. ***Class B:*** All current or former employees of Sullair and/or Sundstrand and their respective beneficiaries, who are or were participants in that portion of the Sundstrand Corporation Retirement Plan-Industrial formerly known as the Sullair Corporation Retirement Plan and whose retirement benefits were improperly calculated because the ESOP offset has not been calculated in accordance with the written terms of the Pension Plan.

That portion of plaintiffs' motion seeking to certify class C is denied at this time. Vanderslice and Greenwood are designated as class representatives of class A and White is designated as class representative of class B. Plaintiffs' request to appoint its counsel as counsel for the class is granted.

ENTER:

PHILIP G. REINHARD, JUDGE

UNITED STATES DISTRICT COURT

DATED: September 30, 1999

Footnotes

[1] In their complaint, plaintiffs allege Count IV is asserted by the proposed members of class D, yet they have not defined such a class (See Compl. P 19, 77-88) In their memorandum, plaintiffs assert Count IV is a claim by the proposed members of class C. The court interprets Count IV as being brought by proposed class C.

[2] Because potential class members with claims involving post-1983 profit sharing, moving expenses, mortgage assistance and directors' fees do not meet Rule 23(a)(1), the court will not analyze such claims under the remaining Rule 23 factors. See *Retired Chicago Police Ass'n, 7 F.3d at 596* (failure to meet any one of the factors in Rule 23(a) precludes certification of the class).

[3] Defendants' argument applies with equal force to both classes White seeks to represent, classes B and C.

[4] In their complaint, plaintiffs allege Count III is being brought by class A (Compl. p. 18), yet in their memorandum requesting class certification, they state class C is bringing Count III. (Pl. Memo., p. 2) Regardless of which class is alleging Count III, the court finds they have not satisfied Rule 23.